

No. 87-121-CFH
Status: GRANTED

Title: Richard L. Dugger, Secretary, Florida Department of
Corrections, and Robert A. Butterworth, Attorney
General of Florida, Petitioners
v.
Aubrey Dennis Adams, Jr.

Docketed:
July 20, 1987

Court: United States Court of Appeals
for the Eleventh Circuit

Counsel for petitioner: Roper, Margene A.

Counsel for respondent: Tabak, Ronald J.

NOTE* This is a former cap. case

Entry	Date	Note	Proceedings and Orders
1	Jul 20 1987	G	Petition for writ of certiorari filed.
2	Aug 19 1987		DISTRIBUTED. September 28, 1987
3	Aug 19 1987		Brief of respondent Aubrey D. Adams, Jr. in opposition filed.
4	Aug 19 1987	G	Motion of respondent for leave to proceed in forma pauperis filed.
6	Oct 2 1987		REDISTRIBUTED. October 9, 1987
8	Feb 29 1988		REDISTRIBUTED. March 4, 1988
9	Mar 7 1988		Motion of respondent for leave to proceed in forma pauperis GRANTED.
10	Mar 7 1988		Petition GRANTED. *****
12	Apr 9 1988		Order extending time to file brief of petitioner on the merits until May 13, 1988.
13	Apr 21 1988		Brief amicus curiae of Criminal Justice Legal Foundation filed.
14	May 10 1988		Record filed.
		*	Certified copy of original record and proceedings, 3 boxes, received.
16	May 13 1988		Brief of petitioner Dugger, Sec., FL DOC, et al. filed.
21	May 13 1988		Joint appendix filed.
18	Jun 2 1988		Order extending time to file brief of respondent on the merits until July 2, 1988.
19	Jul 1 1988		Brief of respondent Aubrey D. Adams, Jr. filed.
20	Jul 1 1988		Brief amici curiae of National Legal Aid And Defender Assn., et al. filed.
22	Jul 26 1988		CIRCULATED.
23	Aug 29 1988		Set for argument. Tuesday, November 1, 1988. (2nd case) (1 hr).
24	Nov 1 1988		ARGUED.

87 121

Supreme Court, U.S.
FILED

JUL 20 1987

JOSEPH F. SPANIOLO, JR.
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NO. _____

Supreme Court of the United States

October Term, 1986

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections, and
ROBERT A. BUTTERWORTH, Attorney General,
State of Florida, Petitioners,

v.

AUBREY DENNIS ADAMS, JR., Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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186 Pp

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit Court of Appeals is in direct and irreconcilable conflict with the Florida Supreme Court and the Fifth Circuit Court of Appeals regarding the opinion of this Court in Caldwell v. Mississippi, and, thereby, deprived similarly situated classes involved in death penalty litigation of a consistent standard of federal review?

2. Whether the Court of Appeals has misapplied Reed v. Ross, 468 U.S. 1 (1984) to justify its review of a procedurally barred claim or whether that decision should be overruled or limited so as to avoid turning each new decision emanating from this Court into cause and prejudice for ignoring an otherwise valid procedural bar?

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COMMISSIONERS OF THE LAND OFFICE

FOR THE YEAR 1881

ALBANY, N. Y.: 1882.

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UNITED STATES DEPARTMENT OF AGRICULTURE

OFFICE OF THE SECRETARY

WASHINGTON, D. C. 20250

TO: THE SECRETARY, U. S. DEPARTMENT OF AGRICULTURE

FROM: THE SECRETARY, U. S. DEPARTMENT OF AGRICULTURE

SUBJECT: [Illegible]

DATE: [Illegible]

RE: [Illegible]

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FOR: [Illegible]

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections, and
ROBERT A. BUTTERWORTH, Attorney General,
State of Florida, Petitioners,

v.

AUBREY DENNIS ADAMS, JR., Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

The petitioners, Richard L. Dugger and Robert A. Butterworth, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on November 13, 1986. A revised opinion was entered on petition for rehearing on April 23, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals, Eleventh Circuit is reported at 804 F.2d 1526 (11th Cir. 1986), and is reprinted in the appendix hereto, p. 1a, infra.

The revised opinion of the Court of Appeals, Eleventh Circuit is reported at 816 F.2d 1493 (11th Cir. 1987), and is reprinted in the appendix hereto, p. 78a, infra.

The decision of the United States District Court for the Middle District of Florida is not yet reported. It is reprinted in the appendix hereto, p. 43a infra.

The decision of the Supreme Court of Florida relevant to the issues herein is reported at 484 So.2d 1216 (Fla. 1986).

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was entered on November 13, 1986. Rehearing was denied on April 23, 1987. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV of the Constitution of the United States provides, inter alia, that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment VIII provides that:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment X provides that:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

Aubrey Dennis Adams was convicted in October 1978 of the first degree murder of eight-year-old Trisa Gail Thornley. Following the jury's recommendation , the trial judge imposed the death sentence in January 1979.¹

¹ The particular facts of the crime, though not relevant to this proceeding at this time, can be found in more detail in Adams v. State, 412 So.2d 850 (Fla. 1982) and Adams v. Wainwright, 764 F.2d 1356 (11th Cir. 1985).

At the beginning of jury selection for Adams' trial, the judge, who is the sentencer, instructed the initial panel of prospective jurors regarding the nature and effect of the jury's recommended sentence in a capital murder trial. He informed them of the advisory nature of their sentencing recommendation, the fact that he could disregard it and sentence Adams to life or death, and that the decision is on his conscience (pp. 4a-5a, *infra*). He gave a substantially similar explanation of the jury's role each time new prospective jurors were seated (p. 5a; 35a, *infra*). Each time this explanation was given, however, it was preceded by an explanation that their advisory sentencing verdict was to be based on the finding and weighing of aggravating and mitigating factors (p. 39a, *infra*). When two prospective jurors indicated that their opposition to the

death penalty would keep them from recommending a death sentence he probed the strength of their convictions, without objection, in terms of whether they could not "vote for a recommendation to the Judge for a death penalty, even though the Judge is not bound to follow it." (p. 40a, *infra*).

During the penalty phase the jury was properly instructed under Florida law as to the fact that their sentencing recommendation is only advisory and that "the final decision as to what punishment shall be imposed rests solely upon the Judge of this Court." (p. 39a, *infra*). Fla. Std. Jury Instr. (Crim.) 2.09. The jury was properly instructed as to the finding and weighing of the mitigating and aggravating circumstances and its duty to follow the law in rendering an advisory sentence and that the verdict should be based upon the evidence. It

was further instructed not to "act hastily or without due regard to the gravity of these proceedings" and told to "carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake." (p. 39a, *infra*). In final closing argument, the prosecutor acknowledged that the jury's recommendation was advisory and admonished the jurors to be fair and impartial to the defendant and also to the people of the State of Florida and that "any way you people decide will satisfy the State of Florida" (Tr. Sentencing, p. 1476).

No objection to such comments was interposed during voir dire. Defense counsel was satisfied with the formal jury instruction at the penalty phase and never requested an alternate or more comprehensive instruction. The propriety of the judge's remarks was never raised as an issue on direct appeal (p. 13a;

37a, infra). Adams collaterally challenged his judgment and sentence in state and federal courts upon the signing of a death warrant, never raising this issue, and all relief was denied. Adams v. State, 456 So.2d 888 (Fla. 1984); Adams v. Wainwright, 764 F.2d 1356 (11th Cir. 1985). Two days prior to his second scheduled execution, Adams, for the first time, raised the issue that the trial judge's remarks violated the precepts of Caldwell v. Mississippi, 105 S.Ct. 2633 (1985), in a second motion to vacate judgment and sentence, which was denied by the trial court on March 3, 1986. The Florida Supreme Court affirmed this denial finding that all newly raised grounds for relief should have been presented on direct appeal or in the first motion to vacate judgment and sentence and were barred from review as an abuse of procedure and by caselaw.

Adams v. State, 484 So.2d 1216, 1217 (Fla. 1986). The court expressly and solely relied on the bar raised by state procedural barriers and never reached the merits of the claim. This Court denied his petition for writ of certiorari. Adams v. Florida, 106 S.Ct. 1506 (1986).

Adams then filed a second habeas petition on March 5, 1986. The district court did not reach the merits of the claim, finding the failure to raise it in the first petition was an abuse of the writ, and that the claim also had been procedurally defaulted in the state courts (pp. 57a-60a, *infra*). Counsel offered as justification for not raising new claims in the previous petition a lack of adequate time to prepare and the novelty of the Caldwell decision. (p. 25a) The district court also determined that the claim derived no merit from Caldwell because the trial judge, and not

the jury, is the sole sentencer in Florida (p. 57a, *infra*). Adams appealed to the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. §1291.

The Eleventh Circuit Court of Appeals found the Caldwell decision to be applicable to Florida's sentencing scheme, and concluded that the judge's statements to the jury were misleading. (pp. 7a-12a; 18a-20a, *infra*). The court ignored procedural bars, finding Caldwell to be a significant change in the law so as to excuse the failure to raise the claim in the previous habeas petition and to establish cause to excuse procedural default in state court, as attorneys lacked the tools to raise this eight amendment claim until the Caldwell decision (pp. 78a-110a, *infra*). The court then found that Adams was prejudiced by the failure to raise the claim (p.

108a, *infra*).

Not content with its original opinion, on petition for rehearing the Eleventh Circuit vacated Part I (A)(2), entitled "Procedural Bar" of its original November 13, 1986, opinion and offered further reasoning in support of its decision (p. 78a, *infra*).

The Supreme Court of Florida has rejected the analysis of the Eleventh Circuit and holds fast to the opinion that such comments must be objected to at trial and raised on direct appeal as Caldwell does not constitute a fundamental change in the law so as to allow consideration of the issue in collateral challenges to the sentence. The court has noted in several cases that such comments, seen in proper context, are accurate. See, e.g. Aldridge v. State, 503 So.2d 1257 (Fla. 1987); Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987).

REASONS FOR GRANTING THE WRIT

I.

THE ELEVENTH CIRCUIT COURT OF APPEALS IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH THE FLORIDA SUPREME COURT AND THE FIFTH CIRCUIT COURT OF APPEALS REGARDING THE OPINION OF THIS COURT IN CALDWELL V. MISSISSIPPI, AND, THEREFORE, IS DEPRIVING SIMILARLY SITUATED CLASSES INVOLVED IN DEATH PENALTY LITIGATION OF A CONSISTENT STANDARD OF FEDERAL REVIEW.

All of the special and important reasons in Rule 17 of the Rules of the Supreme Court of the United States are present to warrant a review on writ of certiorari of the compelling issues presented in this petition.

A. THE FEDERAL COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH THE DECISION OF THE HIGHEST STATE COURT IN THE SAME JURISDICTION.

The Eleventh Circuit found Caldwell v. Mississippi, 105 S.Ct. 2633 (1985), to constitute a significant change in the law so as to establish cause to excuse

procedural default in state court and the failure to raise the claim in the first habeas petition. The Supreme Court of Florida has consistently held that impropriety in comments from the bench or prosecutor must be timely objected to at trial in order to obtain appellate review. See, e.g. Middleton v. State, 465 So.2d 1218 (Fla. 1985). State procedural bars, once enforced, preclude federal habeas review. See, Wainwright v. Sykes, 433 U.S. 72 (1977); Engle v. Isaac, 456 U.S. 107 (1982); Smith v. Murray, 106 S.Ct. 2661 (1986).

The state court has steadfastly followed the standards set forth by this Court. Aldridge v. State, 503 So.2d 1257, 1259 (Fla. 1987); Copeland v. Wainwright, 505 So.2d 425 (Fla. 1985). The Eleventh Circuit, with equal tenacity, has declined to do so. The result has been a total obstruction of

Florida's ability to enforce it's capital punishment statute through usurpation of the state's appellate power by the Eleventh Circuit.

The state Supreme Court's total disagreement with the views of the Eleventh Circuit was made evident in Copeland v. Wainwright, 505 So.2d 425, 427 (Fla. 1987), where it expressly found the application of such procedural barriers proper because Caldwell does not constitute a fundamental change in constitutional law.

The Eleventh Circuit reaffirmed its unwaivering position in Mann v. Dugger, No. 86-3182, slip op. at 23-24 (11th Cir. May 14, 1987), where it again reached the merits of such a claim without regard for either valid state procedural bars or the

decisions of this Court.² See, Harich v. Wainwright, 813 F.2d 1082, 1089 n. 17 (11th Cir. 1987), where it discussed the present case and stated: "...As is evident from Adams, id. at n. 7, a petitioner satisfies the prejudice prong

²Daniel Thomas and David Funchess were executed after having raised claims predicated upon Caldwell v. Mississippi. See, Thomas v. Wainwright, 788 F.2d 684 (11th Cir. 1986); Funchess v. Wainwright, 788 F.2d 1443 (11th Cir. 1986). Thomas, in fact, relied upon the very decision sought to be reviewed. Subsequent to the present decision the Eleventh Circuit decided Harich v. Wainwright, 813 F.2d 1082 (11th Cir. 1987), which involved comments almost identical to the comments in the present case, and concluded that such comments did not minimize the role of the jury. The same panel in Harich most recently reverted to the same subjective grammatical analysis employed in the present case and condemned such statements in Mann v. Dugger, No. 86-3182, slip. op. at 23-24 (11th Cir. May 14, 1987). That Florida death row inmates could meet such differing fates after having raised the same issue can only lead to the conclusion that other unknown, subjective arbitrary considerations are at work, which the Eleventh Circuit has not deigned to share with the State of Florida.

of Sykes when he presents a meritorious Caldwell claim. Accordingly, since there was cause for the failure to raise the Caldwell claim, we will proceed to a discussion of the merits of this claim in lieu of deciding the merits under the guise of a Sykes prejudice inquiry."

Accordingly, it is clear that the highest state court and the federal court hold directly conflicting opinions on an important federal constitutional question, which is an established reason for the grant of certiorari. See, e.g., Andresen v. Maryland, 427 U.S. 463, 470 n. 5 (1976). The conflict is one that can be effectively resolved only by the prompt action of this Court. The reasoning of the Eleventh Circuit is at loggerheads with the reasoning of an equally adamant state court of last

resort, with the result that Florida's death penalty cases cannot move through the federal system.

B. THE FEDERAL COURT OF APPEALS HAS RENDERED A DECISION IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT AND ANOTHER CIRCUIT ON AN EXTREMELY IMPORTANT MATTER OF FEDERAL LAW.

In contrast to the decision of the Eleventh Circuit, the Fifth Circuit, in Moore v. Blackburn, 774 F.2d 97 (5th Cir. 1985), cert. denied, 105 S.Ct. 2904 (1986), barred a Caldwell claim on a successive petition. The Fifth Circuit held that even had the claim not been raised previously, it would have denied the claim as an abuse of the writ, because a competent lawyer would have been aware of the possibility of such a claim. The court cited the language in Caldwell in support of its position. Moore was executed on June 8, 1987.

A fair reading of the Caldwell decision would suggest that the Eleventh Circuit's opinion rests upon a misconstruction of Caldwell. This Court indicated in Caldwell that its decision was not contrary to California v. Ramos, 463 U.S. 992 (1983), stating: "[c]reating this image in the minds of the capital sentencers is not a valid state goal, and Ramos is not to the contrary. Indeed, Ramos itself never questioned the indispensability of sentencers who 'appreciat[e]...the gravity of their choice and...the moral responsibility reposed in them as sentencers.'" 105 S.Ct. at 2643. The Court further recognized the long history of the claim and noted uniform condemnation of such argument. 105 S.Ct at 2642. The claim has been litigated in Florida since 1918. See, e.g., Blackwell v. State, 76 Fla. 124, 79 So. 731, 735-736 (1918);

Corn v. Zant, 708 F.2d 549, 557 (11th Cir. 1983). Indeed, Moore's attorney found the tools to raise this claim pre-Caldwell by virtue of the opinions in Ramos, Lockett v. Ohio, 438 U.S. 586, 605 (1978), and Gregg v. Georgia, 428 U.S. 153, 199, 206-07 (1976) (pp. 111a-119a, infra, excerpts of habeas petition). Caldwell, himself, relied upon Ramos, Woodson v. North Carolina, 428 U.S. 280, 304 (1976), Proffitt v. Florida, 428 U.S. 242, 251-252 (1976), and other cases, in bringing his case before this Court (p. 120a, infra, excerpts from petition for writ of certiorari and reply brief on merits in Caldwell). Moreover, this Court in Caldwell did not undertake review until it assured itself that the state court decision did not rest upon adequate and independent state grounds. 105 S.Ct. at 2638.

The Fifth Circuit, and not the Eleventh, has heeded the admonition of Smith v. Murray, 106 S.Ct. 2661, 2667 (1986), that "...as a comparison of Reed and Engle makes plain, the question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all." Adams had Florida law, the lower court Caldwell decision and numerous decisions of this Court on which to fashion such a claim. In an effort to revert to the more rigid "deliberate bypass" standard the Eleventh Circuit found cause for procedural default from the fact that defense counsel failed to recognize the factual or legal basis for the claim in conflict with this Court's decision in Murray v. Carrier, 106 S.Ct. 2639, 2641 (1986).

Most recently, the Tenth Circuit has followed the reasoning in the present

case in Dutton v. Brown, 812 F.2d 593 (10th Cir. 1987) (petition for certiorari filed April 2, 1987, Supreme Court Case No. 86-1704). This growing division among the circuits will deprive death row inmates similarly situated of a consistent standard of federal review. Thus far, this conflict has proven itself to be capable of repetition while avoiding review. Gerstein v. Pugh, 420 U.S. 103 (1975).

(C) CERTIORARI SHOULD BE GRANTED PURSUANT TO THE SUPERVISORY POWER OF THIS COURT

The Circuit Court's inability or unwillingness to abide by the decisional law of this Court, for any reason, may prompt a grant of certiorari review for the purpose of reaffirming the supremacy of this Court. This supervisory power has historically been used in criminal cases, McNabb v. United States, 318

U.S. 332 (1942); Marshall v. United States, 360 U.S. 310 (1959); United States v. Hasting, 461 U.S. 499 (1983) and has as one of its stated purposes its use as a remedy for the violation of recognized rights.

While these cases refer mainly to a defendant's rights, there exists no prohibition to reciprocal concern for the recognized rights of the states, since they, too, are entitled to justice. Evans v. Bennett, 440 U.S. 1301 (1979).

Federal review power over state criminal proceedings is not supposed to be as broad as review over federal criminal proceedings, McNabb, supra, even under §2254. Sumner v. Mata, 455 U.S. 591 (1982). Absent some exercise of this Court's supervisory power, the unrestrained assumption of review power by the Circuit Court will

substantially disrupt and hamper Florida's established right to enact and enforce its own criminal laws and administer its own independent judicial system.

No mere federal statute can vest this power in a lower federal court, Sumner v. Mata, supra; Atlantic Coast Line Railroad v. Engineers, 398 U.S. 281 (1970), but without intervention, Florida's constitutional rights will continue to be abridged.

II

THE COURT OF APPEALS HAS MISAPPLIED REED V. ROSS, 468 U.S. 1 (1984) TO JUSTIFY ITS REVIEW OF A PROCEDURALLY BARRED CLAIM AND SUCH DECISION SHOULD BE OVERRULED OR LIMITED SO AS TO AVOID TURNING EACH NEW DECISION EMANATING FROM THIS COURT INTO CAUSE AND PREJUDICE FOR IGNORING AN OTHERWISE VALID PROCEDURAL BAR.

Finding that the judge's statements to Adams' jury violated the principles of Caldwell v. Mississippi, the Eleventh Circuit cavalierly concluded that Adams was prejudiced by the statements.

The Eleventh Circuit ceased all analysis upon the finding of cause and never inquired as to the existence of prejudice. Had such inquiry been undertaken the court would have found a decided lack of prejudice, as did the Supreme Court of Florida in Pope v. Wainwright, 496 So.2d 798, 805 (Fla. 1986), where it stated "...Further, if such information should lead the jury to

'shift its sense of responsibility' to the trial court, the trial court, unlike an appellate court, is well-suited to make the initial determination on the appropriateness of the death sentence." Such obvious harmless error analysis was never undertaken by the Eleventh Circuit.

The cause and prejudice test of Wainwright v. Sykes, 433 U.S. 72 (1977), was extended in United States v. Frady, 456 U.S. 152, 168-170 (1982), where this Court held that to obtain collateral relief from errors in a jury charge the petitioner must show that the ailing instruction by itself so infected the entire trial that the resulting conviction violated due process and that the error worked to his actual and substantial disadvantage, not merely that the errors created a "possibility of prejudice." A plainly erroneous reading of Caldwell, however, has resulted in the

notion on the part of the lower court that the prejudice prong can be entirely dispensed with upon finding that a statement would work toward diminishing the jury's sense of responsibility. That the effect of such comments should be looked to, however, was made clear by this Court in Darden v. Wainwright, 106 S.Ct. 2464 n. 15 (1986), where it determined that comments made at the guilt-innocence stage of trial reduced the chance that they had any effect at all on sentencing.

The present decision by the Eleventh Circuit constitutes a complete misreading of Caldwell, and a substantial departure from the rule in Frady, in an apparent attempt to relax the standard for review of constitutional error. Clearly this Court's decision in Sykes and Caldwell never contemplated such future misuse by the Eleventh Circuit, which has created a

virtually untenable situation for the state in avoiding new sentencing proceedings by ignoring any showing of harmless or nonprejudicial error. This Court should accept jurisdiction based upon an improper extension of Caldwell.


CONCLUSION

For these various reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX



IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 86-3207

AUBREY DENNIS ADAMS, JR.,

Petitioner-Appellant,

versus

LOUIE WAINWRIGHT,
JIM SMITH,

Respondents-Appellees.

Appeal from the
United States District Court for the
Middle District of Florida

(November 13, 1986)

Before RONEY, Chief Judge, FAY and
JOHNSON, Circuit Judges.

JOHNSON, Circuit Judge:

Petitioner, Aubrey Dennis Adams, was convicted in October 1978 of the first degree murder of eight-year-old Trisa Gail Thornley and was sentenced to death in January 1979. His conviction and sentence were affirmed by the Florida Supreme

Court, Adams v. State, 412 So.2d 850 (Fla.), cert. denied, 459 U.S. 882 (1982), and his motions for post-conviction relief pursuant to Fla. R. Crim. P. 3.850, Adams v. State, 456 So.2d 888 (Fla. 1984); Adams v. State, 484 So.2d 1216 (Fla. 1986), and petition for writ of habeas corpus in the Supreme Court of Florida, 484 So.2d 1211 (Fla. 1986), cert. denied, 106 S.Ct. 1506 (1986), were denied.

Adams' first petition for a writ of habeas corpus in the district court was denied without evidentiary hearing and this Court affirmed. Adams v. Wainwright, 764 F.2d 1356, reh'g denied, 770 F.2d 1084 (11th Cir. 1985), cert. denied, 106 S.Ct. 834 (1986). This appeal is taken from the district court's denial of Adams' second habeas petition on March 7, 1986.¹

The district court found that all of the claims raised in Adams' second petition were barred, either because of

procedural default in the state courts or because raising them in this second habeas petition constituted an abuse of the writ. We affirm in part and reverse in part, with instructions that the district court issue the writ of habeas corpus unless the State of Florida conducts a new sentencing proceeding before an untainted jury.

I. DISCUSSION

In this appeal Adams raises five claims:

(1) violation of Caldwell v. Mississippi through statements by the trial judge that misled the jury as to their role in the sentencing process; (2) incompetency to stand trial; (3) ineffective assistance of counsel through failure to provide Adams with a competent psychiatric expert; (4) ineffective assistance of counsel through failure to challenge the voluntariness of Adams' confession; and (5) ineffective

assistance of counsel through failure to consult an expert pathologist to rebut certain testimony of the State's expert witnesses.

A. Caldwell Claim

At the beginning of jury selection for Adams' trial, the judge instructed the initial panel of prospective jurors as follows regarding the nature and effect of the jury's recommended sentence in a capital murder trial:

The Court is not bound by your recommendation. The ultimate responsibility for what this man gets is not on your shoulders. It's on my shoulders. You are merely an advisory group to me in Phase Two. You can come back and say, Judge, we think you ought to give the man life. I can say, I disregard the recommendation of the Jury and I give him death. You can come back and say, Judge, we think he ought to be put to death. I can say, I disregard your recommendation and give him life. So that this conscience part of it as to whether or not you're going to put the man to

death or not, that is not your decision to make. That's only my decision to make and it has to be on my conscience. It cannot be on yours.

The judge gave a substantially similar explanation of the jury's role in the sentencing process each time new prospective jurors were seated in the jury box.² He also interrupted counsel's voir dire of prospective jurors on two occasions to reiterate that the court, and not the jury, was responsible for sentencing. Four members of Adams' jury heard these remarks eleven times, three heard the remarks nine times, one heard them six times, one heard them five times, and the remaining three jurors heard them four times.

Adams argues these statements by the judge violated the Eighth Amendment as interpreted in Caldwell v. Mississippi, which held that "it is constitutionally impermissible to rest a death sentence on

a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 105 S.Ct. 2633, 2639 (1985). The district court did not reach the merits of this claim, finding that the failure to raise the claim in Adams' first habeas petition constituted an abuse of the writ, and that the claim also had been procedurally defaulted in the state courts. The district court's findings were based on its determination that Adams' claim "does not derive any merit from the Caldwell decision" because the trial judge, and not the jury, is the sole sentencer in Florida. The district court rejected Adams' argument that the jury plays a critical role in the sentencing process in Florida because the court thought it significant that, while a trial judge in Florida is limited in his ability

to override a jury verdict recommending life imprisonment, "[n]othing in Florida law suggests that a similar presumption of correctness is due a jury recommendation of a death sentence." Because we find that Caldwell is applicable to statements that diminish the sense of responsibility of the advisory jury for its recommended sentence under the Florida system, we find that the district court erred in dismissing this claim on the grounds of abuse of the writ and state procedural default. Further, we find that the judge's statements in this case created an intolerable danger that the jury's sense of responsibility for its advisory sentence was diminished, thereby rendering Adams' death sentence unreliable in violation of the Eighth Amendment.

1. Applicability of Caldwell to Florida's Sentencing Scheme

The district court's determination

that Caldwell was inapplicable to Adams' case was based on an inaccurate assessment of the role of the jury in the Florida system and a misunderstanding of the significance of the jury override. Under Florida's trifurcated procedure in capital felony cases, after a jury determination of guilt, a separate sentencing proceeding is held before the jury, after which the jury renders an advisory sentence based on its weighing of aggravating and mitigating circumstances. Fla. Stat. Ann. § 921.141(1)-(2) (1985). Although the trial judge must then independently weigh the aggravating and mitigating circumstances and render sentence, the jury's recommendation, which represents the judgment of the community as to whether the death sentence is appropriate in a given case, is entitled to great weight, McC Campbell v. State, 421 So.2d 1072, 1075 (Fla. 1982) (per curiam), and may be

rejected by the trial judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) (per curiam). This limitation on the judge's exercise of the jury override provides a "crucial protection" for the defendant. Dobbert v. Florida, 432 U.S. 282, 295 (1977).

In light of the limited nature of the jury override, it is clear that the district court's reliance on the judge's status as the "sole sentencer" was misplaced. While the judge is in fact the only entity that imposes sentence under the Florida scheme, his role is to serve as "a buffer where the jury allows emotion to override the duty of a deliberate determination" of the appropriate sentence. Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976), cert. denied, 431 U.S. 925 (1977). Because of the deference

given the jury's recommended sentence, that recommendation establishes the "parameters" for all subsequent consideration of the appropriate sentence, including that of the trial judge, and makes "[t]he jury's role in an advisory sentencing proceeding...critical." Adams, 764 F.2d at 1364.

Further, the district court's reasoning that the jury did not play a critical role in Adams' sentencing because no presumption of correctness attaches under Florida law to a jury recommendation of death misses the importance of both the jury override and Caldwell. The important consideration is not whether the Tedder presumption of correctness attaches to a sentence recommending death, but whether the judge's statements made it less likely that the jury would recommend life. As this Court recognized in Adams I, "[e]very error in instruction which makes it less

likely that the jury will recommend a life sentence to some degree deprives the defendant of the protections afforded by the presumption of correctness that attaches to a jury's verdict recommending life imprisonment." 764 F.2d at 1364. When the error involves statements that diminish the jury's sense of responsibility for its sentence, Caldwell makes it clear that an impermissible likelihood the jury will be biased in favor of rendering a sentence of death is created. 105 S.Ct. at 2640.³

Clearly, then, the jury's role in the Florida sentencing process is so crucial that dilution of its sense of responsibility for its recommended sentence constitutes a violation of Caldwell. In fact, the Florida Supreme Court recently has recognized that the concerns expressed in Caldwell apply to the Florida sentencing scheme, stating

that "[i]t is appropriate to stress to the jury the seriousness which it should attach to its recommendation" and that "[t]o do otherwise would be contrary to Caldwell v. Mississippi and Tedder v. State." Garcia v. State, 492 So.2d 360, 367 (Fla. 1986) (citations omitted).⁴

2. Procedural Bar

A district court need not consider a claim raised for the first time in a second habeas petition, unless the petitioner establishes that the failure to raise the claim earlier was not the result of intentional abandonment or withholding or inexcusable neglect. Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts; Witt v. Wainwright, 755 F.2d 1396, 1397 (11th Cir. 1985). Consideration of a claim also can be barred by failure to comply with state procedural rules, absent a showing of cause for, and prejudice resulting from,

such failure. Wainwright v. Sykes, 433 U.S. 72, 87 (1977); accord, Engle v. Isaac, 456 U.S. 107, 110 (1982). A significant change in applicable law, however, can both excuse the failure to raise a claim in a previous petition, Witt, 755 F.2d at 1397, and establish cause to excuse procedural default in state court. Reed v. Ross, 468 U.S. 1, 16 (1984).

Because Caldwell represents a significant change in the law and was not decided until after dismissal of Adams' first habeas petition, we find that raising this claim in a successive habeas petition does not constitute an abuse of the writ. Further, as the legal basis for Adams' claim was not reasonably available to Adams until the Caldwell decision,⁵ the district court erred in finding that Adams had failed to establish cause for any procedural default in the state courts.⁶

Adams also was prejudiced by the failure to raise this claim. As discussed below, the judge's statements to Adams' jury clearly violated the principles enunciated in Caldwell, thereby rendering the jury's recommended sentence unreliable.⁷

3. Merits of the Caldwell Claim

Caldwell involved prosecutorial comments during closing argument informing the jury that its decision was not final because it was subject to automatic review by the state supreme court. 105 S.Ct. at 2638. The Supreme Court found that these comments violated the Eighth Amendment because they diminished the reliability of the jury's "determination that death is the appropriate punishment in a specific case" and created a bias in favor of imposition of the death penalty. Id. at 2640. Review of Adams' case in light of the concerns expressed in Caldwell shows that the judge's statements to Adams' jury

created a similar unreliability with regard to the determination that death was the appropriate punishment for Adams.

The Caldwell Court found that delegation of sentencing responsibility to the appellate court would not simply postpone a defendant's right to a fair determination of the appropriateness of his death, but would deprive him of that right because the appellate court does not "confront and examine the individuality of the defendant," but merely reviews the jury determination, giving that determination a presumption of correctness. Id. at 2640-2641. Unlike the appellate court in Caldwell, the Florida judge does have the opportunity to view witnesses and hear evidence. However, Florida has determined that it is the jury which should perform the task of reconciling conflicting evidence and weighing the aggravating and mitigating

factors. Chambers v. State, 339 So.2d 204, 208-09 (Fla. 1976) (England, J., concurring). Therefore, much like the Mississippi appellate court, the Florida trial judge is limited in his ability to override the jury recommendation. The judge's statements to Adams' jury indicating he was free to ignore the jury's recommendation thus were misleading as to the nature of his task in much the same way that the statements in Caldwell were misleading as to the role of appellate review.

The Caldwell Court noted that the danger of bias in favor of the death penalty is created by the possibility that a jury unconvinced that death is the appropriate punishment might nevertheless impose the death penalty as a message of extreme disapproval of the defendant's acts if it believed that its error in doing so would be corrected on appeal.

105 S.Ct. at 2641. The danger that Adams' jury, relieved of responsibility for determining his fate, would feel free to express its outrage at the senseless killing of an eight-year-old girl clearly was present.

The Caldwell Court also found that the prejudicial effect of the prosecutor's argument was increased by the fact jurors would be likely to find minimization of their otherwise difficult role of determining whether another should die attractive, particularly when they were told that the alternative decision makers were legal authorities that they might view as having more of a right to make such an important decision. Id. at 2641-42. In Adams' case, the judge clearly told the jurors that he was the one assigned this decision and that the jurors should not worry about the "conscience part of it." Indeed, because it was the

trial judge who made the misleading statements in this case, representing them to be an accurate description of the jury's responsibility, the jury was even more likely to have believed that its recommended sentence would have no effect and to have minimized its role than the jury in Caldwell. Cf. id. at 2645 (noting importance of fact trial judge agreed with prosecutor's remarks).

Finally, as in Caldwell, we cannot say that the judge's efforts to minimize the jury's sense of responsibility for Adams' sentence had no effect on the jury's sentencing decision. See id. at 2646.⁸ Adams' case is not one in which the only reasonable sentence would have been death. The judge found an equal number (three) of mitigating factors and aggravating factors. Adams v. State, 412 So.2d at 854. Thus, the relative weight placed on those factors by the jury in

Adams' case was especially important, as it is highly unlikely that its recommendation of either life or death would be overturned by the judge.⁹ In other words, Adams' case fell within the area of deference to the jury's recommended sentence which makes the need for reliability in that recommended sentence of critical importance.

As in Caldwell, the real danger exists that the judge's statements caused Adams' jury to abdicate its "awesome responsibility" for determining whether death was the appropriate punishment in the first instance. Because in Adams' case the jury's recommended sentence of either life or death would fall within the wide area of deference established by the Tedder standard, Adams might be executed although no sentencer had ever made a considered determination that death was the appropriate sentence if his sentence

were allowed to stand. See Caldwell, 105 S.Ct. at 2641. Therefore, we find that the trial judge's seriously misleading statements regarding the importance and effect of the jury's recommended sentence created an impermissible danger that the recommended sentence was unreliable and, consequently, that Adams' death sentence was unreliable, and reverse the district court's denial of Adams' habeas petition.

B. Competency to Stand Trial

Adams asserts he was incompetent to stand trial because of his amnesia regarding most of the events surrounding the crime. This claim was raised in Adams' first petition for habeas corpus and was decided on the merits. When a claim has been decided on the merits in a prior habeas proceeding, it may be dismissed by the district judge, unless the petitioner establishes that the ends of justice would be served by

reconsideration of the claim. Witt, 755 F.2d at 1397. Whether the ends of justice will be served is determined by objective factors, such as whether there was a full and fair hearing on the original petition or whether there was an intervening change in the facts of the case or the applicable law. Id.; accord, Sanders v. United States, 373 U.S. 1, 17 (1963).

Adams asserts that the interests of justice require a rehearing of this claim because of new evidence in the form of two comprehensive psychiatric and psychological evaluations not presented to the district court in Adams' previous petition. The only reason given for not obtaining these reports earlier, however, is that Adams' former habeas counsel was appointed when execution was imminent and therefore did not have time to obtain detailed psychiatric and psychological reports. Failure to present a claim in a

previous habeas petition because of the haste with which the petition was prepared does not prevent that failure from constituting an abuse of the writ. Antone v. Dugger, 465 U.S. 200, 206 n. 4 (1984) (per curiam). This is true even though counsel was appointed when execution was imminent and counsel therefore did not have sufficient time to familiarize himself with the case. Id. The rationale of Antone is equally applicable to the situation where a claim is presented and considered, but the petitioner asserts that significant evidence, although available, was not obtained because of time constraints.¹⁰ The district court did not err in refusing to reconsider this claim.

Further, we agree with the district court's conclusion that the new reports "do nothing to vitiate this Court's prior determination that Petitioner has not

raised a legitimate doubt that he was capable of fully understanding the proceedings against him and cooperating meaningfully with his attorney in preparing his defense." As the district court noted, the new reports merely draw the obvious conclusions as to the effects of Adams' partial amnesia with regard to the events surrounding the crime on his ability to participate in the trial. As we stated in Adams I, "[w]hile a defendant's inability to remember his participation in a crime may have some bearing on whether he is mentally incompetent, it is possible for a defendant to have no recall of his involvement in a crime and yet fully understand the proceedings against him and cooperate meaningfully with his attorney in his defense." 764 F.2d at 1361.

C. Ineffective Assistance of Counsel
Claims

Adams asserts three claims of ineffective assistance of counsel. The first claim--failure to provide Adams with a competent psychiatric examination--was raised in Adams' first habeas petition and the district court found that the ends of justice did not require its reconsideration. The other two claims--failure to challenge the voluntariness of Adams' confession and failure to consult a pathologist to rebut the state's expert testimony--were raised for the first time in the second petition. The district court found that the failure to challenge the voluntariness of Adams' confession had been raised in Adams' first 3.850 motion and then intentionally abandoned on appeal so that raising that issue for the first time in a successive petition constituted an abuse of the writ and that the claim regarding failure to consult a pathologist was procedurally barred because it was not

raised in the appropriate state court proceeding.

Adams asserts that the first two claims are based on the new reports which were not available at the time of the first petition because of the haste with which the first petition was prepared. As discussed above, haste in preparation of an initial petition neither excuses the failure to raise a claim in a prior petition nor excuses the failure to present evidence available at the time of that petition. Adams offers no reason why the third claim was not presented in the appropriate state court proceeding, nor does any reason become apparent from review of the record. Therefore, the district court did not err in dismissing these claims.

Further, even if the claims were not barred, we agree with the district court's determination that they are without

merit. To establish ineffective assistance of counsel, the petitioner must show both that counsel acted in a manner professionally unreasonable under the circumstances and that prejudice resulted in the form of a reasonable probability that, but for the challenged conduct, the result of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984). The record does not indicate that the actions of Adams' trial counsel constitute ineffective assistance under the Strickland test.

1. Competent Psychiatric Evaluation at the Time of Trial

Adams asserts that his trial counsel's ineffective assistance deprived him of a competent psychiatric evaluation at trial that would have revealed critical mitigating evidence and evidence of incompetency to stand trial. He argues

his trial counsel should have had the private psychiatrist who examined Adams at the time of trial conduct a more thorough examination regarding Adams' competency, his ability to conform his conduct to the law at the time of the offense, and the voluntariness of his confession.

This Court held in Adams I that no prejudice resulted to Adams from his trial counsel's failure to pursue an incompetency claim because neither the exam that was conducted before trial nor the post-trial examination raised a real, substantial, and legitimate doubt as to his mental competency at the time of trial. 764 F.2d at 1367. As discussed above in connection with the incompetency claim, the new reports contain nothing that would alter that determination. Further, as discussed below, trial counsel did not act in a professionally unreasonable manner in not challenging the

voluntariness of Adams' confession. Therefore, we find this claim without merit.¹¹

2. Failure to Challenge Adams' Confession

Adams asserts that his trial counsel did not effectively challenge the voluntariness of Adams' confession because, although he moved before trial to suppress the confession as involuntary, as well as on grounds of inadequate Miranda warnings, he only pursued the Miranda challenge at trial. Adams argues that competent counsel would have (1) contested the voluntariness of Adams' confession at a pretrial hearing utilizing psychiatric evidence, and (2) if unsuccessful in having the confession suppressed, would have submitted the voluntariness and reliability of the confession to the jury through appropriate jury instructions.

In order to establish an ineffective assistance of counsel claim, the defendant

must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and "might be considered sound trial strategy" under the circumstances. Strickland, 466 U.S. at 689. Our review of the record indicates that Adams has failed to overcome this presumption.¹² "[A] strategic decision to pursue less than all plausible lines of defense will rarely, if ever, be deemed ineffective if counsel first adequately investigated the rejected alternatives." Palmer v. Wainwright, 725 F.2d 1511, 1521 (11th Cir. 1984), cert. denied, 105 S.Ct. 227 (1984). The record clearly shows that Adams' attorney had investigated the events surrounding Adams' confession. We cannot say on this record that his decision after that investigation to challenge the confession only on Miranda grounds falls outside "the wide range of

reasonable professional assistance."

Adams' contention that his counsel was ineffective because of failure to request a jury instruction to the effect that the jury should decide the voluntariness of the confession for themselves also is without merit. Under Florida law, once a confession is admitted into evidence, the defendant is entitled to present evidence to the jury pertaining to the circumstances under which the confession was made so the jury can determine the weight to be given the confession. Palmer v. State, 397 So.2d 648, 653 (Fla.), cert. denied, 454 U.S. 882 (1981). The jury does not determine voluntariness of the confession; it simply determines the weight to be given a confession that the judge had determined is voluntary. Id. The record shows that Adams' trial counsel brought out the circumstances surrounding the confession

during his cross-examination of the interrogating officers. The jury instruction given stated that "A confession voluntarily made should be given fair and unprejudiced consideration with due regard to the time and circumstances under which it was made, its harmony or inconsistency with other evidence as well as the motives shown by the evidence to have influenced the making of the confession." This instruction is consistent with Florida law and Adams' counsel was not ineffective in failing to request another, particularly one that would have been inaccurate.

3. Failure to Obtain the Assistance of an Expert Pathologist

At trial, the state called two pathologists who expressed their opinion that the probable cause of death of the victim was strangulation rather than manual suffocation. One expert also

expressed the opinion that the victim's hands were bound before death. This testimony was relevant to the issue of premeditation, and the opinion that the victim's hands were bound before death was one of the factors the state trial judge relied upon in finding the aggravating factor that the capital felony was "especially heinous, atrocious, or cruel." See, Adams v. State, 412 So.2d at 856 (quoting trial judge's sentencing findings). On cross-examination by Adams' trial counsel, these experts admitted that the cause of death and whether the victim's hands were bound before death could not be determined with reasonable medical certainty because of the decomposed state of the body, and one expert stated that death by suffocation was possible. Trial counsel argued these weaknesses in the state's expert testimony during closing argument. Adams argues

that trial counsel should have consulted an expert pathologist to rebut the state's witnesses. In support of this contention Adams offers the affidavit of a county medical examiner, which indicates that the opinions expressed by the state witnesses had no scientific basis.

Counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary" and "a particular decision not to investigate must be directly assessed for reasonableness in all of the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691. We agree with the district court's determination that, because the weaknesses in the testimony of the state's experts were pointed out to the jury, counsel's failure to further investigate the expert

testimony was not unreasonable and the defense was not prejudiced.

II. CONCLUSION

The district court's denial of a writ of habeas corpus with regard to Adams' Caldwell claim is REVERSED, and this case is REMANDED to the district court with instructions to issue the writ of habeas corpus if the State of Florida does not afford Adams a new sentencing proceeding before an untainted jury. See, Lucas v. State, 490 So.2d 943, 945-46 (Fla. 1986) (error affecting jury's sentencing determination requires new sentencing proceeding before a jury).

AFFIRMED IN PART; REVERSED IN PART and REMANDED.

1 The district court also denied Adams' motion pursuant to Fed R. Civ. P. 60(b) for relief from the judgment denying his first habeas petition. Adams subsequently moved for voluntary dismissal of his appeal of denial of that motion and this Court denied a certificate of probable cause with regard to that motion and dismissed that appeal on May 23, 1986.

2 The judge had intended to give this explanation to the entire jury venire before the selection process began, but he forgot to do so, thereby necessitating the procedure actually followed. The explanation was given on nine separate occasions.

3 We also note that the district court's interpretation of Florida law seems inaccurate. Although the weight to be given the jury's recommendation has most often been considered in Florida in the context of a judge-imposed death sentence despite a jury recommendation of life imprisonment, we have found nothing in Florida law to indicate that only jury recommendations of life imprisonment are entitled to great weight. See, e.g., LeDuc v. State, 365 So.2d 149, 151 (Fla. 1978), cert. denied, 444 U.S. 885 (1979) (per curiam) (on appeal of death sentence recommended by jury and imposed by judge, court stated "[t]he primary standard for our review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation," citing Tedder); Chambers v. State, 339 So.2d 204, 208 (Fla. 1976) (England, J., concurring) (discussing both cases where recommendation was life and recommendation

was death as espousing the same guidelines regarding the jury's role). As discussed above, however, even if Florida did make this distinction, the important consideration is not whether a presumption of correctness attaches to a recommendation of death, but whether the judge's statements made it less likely that a life sentence would be recommended.

4 In the earlier case of Darden v. State, 475 So.2d 217 (Fla. 1985), the Florida Supreme Court had stated in rejecting a Caldwell claim that "[w]e do not find such egregious misinformation in the record of this trial [as was present in Caldwell], and we also note that Mississippi's capital punishment statute vests in the jury the ultimate decision of life or death, whereas, in Florida, that decision resides with the trial judge." Id. at 221. While this statement suggests that the Florida Supreme Court considers the differences between the Mississippi and Florida systems relevant to the consideration of a Caldwell claim, its later decision in Garcia makes it clear that it does not consider those differences sufficient to make Caldwell inapplicable to the Florida sentencing procedure.

5 A new development in the law is sufficient to constitute "cause" for a procedural default only if the defendant did not have the legal tools available to construct the claim previously because "[w]here the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default." Engle, 456 U.S. at

133-134. We have found no law indicating that this type of claim was being raised by other defendants at the time of Adams' sentencing and his appeal. Despite the state's argument to the contrary, the Tedder decision itself clearly did not provide sufficient basis for raising this claim, as Tedder dealt only with the weight to be given the jury's recommended sentence and not with the constitutional implications of statements that diminish the jury's sense of responsibility for its sentence.

Further, the only Supreme Court pronouncement relevant to Adams' claim before Caldwell was California v. Ramos, 463 U.S. 992 (1983), which upheld a jury instruction informing the jury that the Governor could commute a life sentence without parole. Id. at 1014. This decision, if anything, seemed to sanction statements such as those made by the judge at Adams' trial. Cf. Reed, 468 U.S. at 17 (one way in which new constitutional rule representing clear break with the past may emerge is when the decision disapproves a practice that the Court's former cases arguably have sanctioned). In fact, the Caldwell Court found it necessary to distinguish Ramos, which had been relied upon by the Mississippi Supreme Court in upholding Caldwell's death sentence, in reaching its decision. Caldwell, 105 S.Ct. at 2643.

⁶ It is doubtful that procedural default is present in this case because it does not appear that the Florida Supreme Court's holding that Adams' Caldwell claim was barred from consideration in a post-conviction proceeding because of failure to raise it on direct appeal, Adams v. State, 484 So.2d 1216, 1217 (Fla. 1986), constitutes "an independent and adequate"

basis under state law for the denial of relief. Sykes, 433 U.S. at 87; Spencer v. Kemp, 781 F.2d 1458, 1463 (11th Cir. 1986). Under Florida law, claims based on constitutional changes in the law since the time of a petitioner's direct appeal of sufficient magnitude to warrant retroactive application are cognizable in Rule 3.850 proceedings, see Witt v. State, 387 So.2d 922, 929 cert. denied, 449 U.S. 1067 (1980), as are claims involving fundamental errors. See Palmes v. Wainwright, 460 So.2d 362, 365 (Fla. 1984). In fact, Adams' Caldwell claim is the very type of claim for which Florida created the Rule 3.850 procedure. See Witt, 387 So.2d at 927 (genesis of Rule 3.850 was Florida's desire to provide a mechanism for petitioners to raise challenges based on major constitutional changes in the law). Therefore, the Florida Supreme Court's decision either must rest on an incorrect determination as to the applicability of Caldwell, or represents application of a procedural bar with regard to a type of claim that Florida does not regularly and consistently bar. See Ake v. Oklahoma, 105 S.Ct. 1087, 1093 (1985) (when application of state procedural bar depends on an antecedent ruling as to whether federal constitutional error has been committed there is no independent and adequate state law ground); Spencer, 781 F.2d at 1470 (state procedural rule that is sporadically applied is not independent and adequate state ground).

7 The state argues that prejudice cannot be demonstrated because (1) the comments were a correct assessment of Florida law, (2) the judge's instructions to the jury as to aggravating and mitigating factors and their weighing would make it clear the

jury should render its advisory sentence on the individual circumstances of the case and (3) the comments were made during voir dire, when the judge was merely trying to give the prospective jurors some sense of the sentencing structure.

As discussed above, however, the judge's comments were misleading because they left the jury with a false impression as to the significance of their role in the sentencing process. Further, the judge's instructions regarding mitigating and aggravating circumstances did not cure the misleading statements, because there was no withdrawal or correction of those statements. Cf., Caldwell, 105 S.Ct. at 2645 n. 7 (prosecutor's later statements that jury played important role did not cure misleading statements because prosecutor did not retract or undermine those statements). Although the trial judge instructed the jury during the penalty phase not to "act hastily or without due regard to the gravity of these proceedings" and told it to "carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake," nothing he said corrected the jury's misunderstanding of the significance of its recommendation. In fact, at the beginning of the penalty phase, the judge reinforced his prior comments by stating that "the final decision as to what punishment shall be imposed rests solely upon the Judge of this Court." He also made a similar remark at the beginning of the penalty phase jury instructions. Further, the fact the jury heard these statements during voir dire does not mean that the statements did not influence the jury. These statements were not isolated or insignificant comments. They were made by the judge at a time when he purportedly

was informing the prospective jurors as to their role in the trial, the statements were made repeatedly, and the judge informed the prospective jurors that the substance of these statements was "the most important thing to remember in Phase Two."

8 It is very clear that the judge's statements were aimed at relieving prospective jurors of any concerns that they might have about recommending a death sentence. Not only did he repeatedly stress to the prospective jurors that they should not worry about the "conscience part of it" but, when two prospective jurors indicated that their opposition to the death penalty would keep them from recommending a death sentence under any circumstances, he probed the strength of their convictions in terms of whether they could not "vote for a recommendation to the Judge for a death penalty, even though the Judge is not bound to follow it."

9 In fact, Justices Boyd and McDonald dissented from the Florida Supreme Court's affirmance of Adams' sentence and Justice Boyd filed an opinion in which he indicated that Adams' death sentence was disproportionate in light of prior similar cases. *Adams v. State*, 412 So.2d 850, 857 (Fla. 1982) (Boyd, J., concurring in part and dissenting in part). Justice McDonald dissented from affirmance of the denial of Adams' first Rule 3.850 motion on similar grounds. *Adams v. State*, 456 So.2d 888, 891 (Fla. 1984) (McDonald, J., dissenting).

10 We also note that the new reports do not differ in kind from the psychological evidence available to the district court on Adams' first petition and are drawn

from information available at the time of that first petition. Therefore, they are not the type of new evidence that would justify reconsideration of Adams' incompetency claim. Cf. Smith v. Kemp, 715 F.2d 1459, 1468-69 (11th Cir. 1983) (denying reconsideration of habeas claim when new evidence consisted of modified and expanded version of statistics rejected by court in adjudicating merits of first petition and contained additional conclusions drawn from same records available at time of first petition) (court noted that otherwise unsuccessful habeas petitioner could file successive petitions by offering additional arguments and conclusions based on ongoing study).

11 Adams cites Ake v. Oklahoma, 105 S.Ct. 1087 (1985), in support of his claim of entitlement to a competent psychiatric expert. In Ake, the Supreme Court held that when a defendant demonstrates to the trial judge that his sanity at the time of the offense will be a significant factor at trial, the state must assure the defendant access to a competent psychiatrist. Id. at 1097. As the district court noted, Ake is not applicable because Adams did not make a showing at the time of trial that his sanity would be an issue and did not request a court-appointed psychiatrist. Although Ake does express a recognition of the importance of psychiatric evaluation in some cases, it adds nothing to Adams' ineffective assistance claim, which is not based on the failure to provide a psychiatrist, but on the scope of the psychiatric examination that was conducted. See id. (holding does not mean defendant has constitutional right to choose a psychiatrist of his personal liking).

12 This Court conducts an independent review of the record in determining the ultimate question of whether a confession was voluntary, *Jurek v. Estelle*, 623 F.2d 929, 932 (5th Cir. 1980), and in determining whether a petitioner was denied effective assistance of counsel. *Smith v. Wainwright*, 777 F.2d 609, 615-16, reh'g denied, 785 F.2d 1037 (11th Cir. 1985)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

AUBREY DENNIS ADAMS,

Petitioner,

v.

No. 86-64-Civ-Oc-16

LOUIE L. WAINWRIGHT,

Respondent.

ORDER AND OPINION

The above-styled cause is before the Court on a second petition for writ of habeas corpus, filed Wednesday, March 5, 1986 at 3:49 p.m. by AUBREY DENNIS ADAMS, JR., a death row inmate at Florida State Prison. After yet another careful and thorough review of the record in this cause, and after hearing argument of counsel for the respective parties, the Court concludes that the petition for writ of habeas corpus must be denied.

Procedural History

The bulk of the procedural history of this case was set forth in this Court's Order and Opinion denying Petitioner's first petition for writ of habeas corpus, entered September 18, 1984, and need not be repeated here. Said Order was affirmed on appeal in Adams v. Wainwright, 764 F.2d 1356 (11th Cir. 1985), reh'g denied en banc, 770 F.2d 1084 (11th Cir. 1985), cert. denied, ____ S.Ct. ____ (Jan. 13, 1986).

On February 17, 1986, the Governor of Florida signed a death warrant ordering Petitioner's execution during the week commencing February 26, 1986. Execution was scheduled for March 4, 1986 at 7:00 a.m. Petitioner filed a petition for writ of habeas corpus in the Supreme Court of Florida on February 21, 1986, which was denied on February 26, 1986. Petitioner

thereafter filed an application for stay of execution pending filing of a petition for writ of certiorari in the United States Supreme Court, which was denied February 28, 1986. The Supreme Court also denied a motion to reconsider its denial of the stay on March 1, 1986.

Petitioner filed a motion to vacate judgment and sentence pursuant to Florida Rule of Criminal Procedure 3.850 and an application for stay of execution on March 2, 1986. On March 3, 1986, the state trial court denied these motions, the Florida Supreme Court affirmed this denial, and the Governor suspended the execution of the sentence imposed upon Petitioner pending the outcome of an examination of the mental condition of said inmate conducted pursuant to Fla. Stat. § 922.07.

Petitioner filed the instant petition for writ of habeas corpus on March 5,

1986. The next day, the Governor of Florida dissolved the stay and signed a third death warrant ordering Petitioner's execution during the week commencing March 6, 1986. Because the execution was scheduled for March 7, 1986 at 10:00 o'clock a.m., this Court held an emergency hearing on the petition on March 6, 1986, commencing at 7:50 p.m. At the conclusion of this hearing, the Court learned that the United States Supreme Court had just vacated its order of February 28, 1986 and granted a stay of the impending execution pending its determination of whether to grant a writ of certiorari on Petitioner's claim premised upon Griqsby v. Mabry, 758 F.2d 226 (8th Cir. 1985).

Abuse of the Writ

Because this is a successive petition, and Respondents allege an abuse of the writ of habeas corpus, the Court must consider whether the claims raised

herein should be barred pursuant to Rule 9(b) of the Rules governing 28 U.S.C. § 2254. Rule 9(b) provides as follows:

(b) Successive petitions.

A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

This rule restates the judicially developed doctrine of abuse of the writ, and provides that successive federal habeas petitions will not be entertained (1) with respect to issues which were raised and adjudicated on the merits in a previous petition if the ends of justice would not be served by reconsideration of the merits, and (2) with respect to issues not previously presented in an earlier petition if failure to raise the issues is the result of inexcusable neglect or

intentional abandonment or withholding. See Sanders v. United States, 373 U.S. 1 (1963); Witt v. Wainwright, 755 F.2d 1396 (11th Cir. 1985). Because the State has alleged an abuse of the writ by this second federal habeas petition, Petitioner must bear the burden of rebutting this contention.

Grounds for Relief

Petitioner's first claim is that he was not competent to stand trial. This claim was presented and addressed in Petitioner's first habeas petition and it is therefore barred unless Petitioner can establish that the ends of justice require its reconsideration. Petitioner contends that the ends of justice require revisiting this issue because Petitioner has obtained extensive examinations and diagnoses for the first time. These examinations were allegedly unavailable when Petitioner was first before this

Court due to the severe time constraints caused by counsel's agreement to represent Petitioner after a death warrant had been signed in 1984.

The Court finds that Petitioner has not met his burden of refuting the state's contention of abuse of the writ. The ends of justice do not warrant reconsideration of this claim for several reasons. First, the recently obtained opinions of Dr. Dennis F. Koson and Dr. Manuel Chaknis, attached as Exhibits A and B to the instant petition, diagnose Petitioner as having a genuine amnesia for the circumstances surrounding the offense. This diagnosis was considered by the Court at the time of Petitioner's first habeas petition, as this was also the opinion of Dr. Sandra Gilels. Dr. Gilels evaluated Petitioner after the conviction, and concluded on February 21, 1984 that Petitioner suffers from catathymic

amnesia, a mental disorder that renders him unable to recall traumatic experiences. The newly obtained reports differ from that of Dr. Gilels only in that they draw the obvious conclusions regarding the impact of this memory loss on Petitioner's competency to stand trial; to-wit, "He was and is unable to disclose to his attorney pertinent facts surrounding the event, his involvement or lack of involvement, and details concerning his own state of mind, behavior and emotional condition at the time of the offense, thus compromising his ability to assist counsel rationally in the implementation of a defense."

As the Eleventh Circuit noted on the appeal from this Court's denial of Petitioner's first habeas petition, "The right not to be tried and sentenced unless mentally competent does not extend so far as to ensure total recall." Adams v.

Wainwright, 764 F.2d 1356, 1361 (11th Cir. 1985). While the opinions of Drs. Koson and Chaknis reaffirm that Petitioner has no recall of his involvement in this crime, they do nothing to vitiate this Court's prior determination that Petitioner has not raised a legitimate doubt that he was capable of fully understanding the proceedings against him and cooperating meaningfully with his attorney in preparing his defense. Dusky v. United States, 362 U.S. 402 (1960). These reports do not provide any basis for believing that at the time of trial, as opposed to the time of the offense, Petitioner was too confused or emotionally disturbed to communicate or cooperate with counsel in planning a defense. Indeed, the record belies any such contention because Petitioner's counsel did not claim at any time during trial or sentencing that the Petitioner was in fact

incompetent. Nor does Petitioner now proffer the affidavit or testimony of Petitioner's trial counsel that he could not cooperate meaningfully with Petitioner at the time of trial.

The Court also finds Petitioner's contention that the newly obtained psychiatric and psychological reports were unavailable in 1984 due to habeas counsel's severe time constraints unconvincing. In February of 1984, Philip Padovano, Esq. obtained the opinion of Dr. Gilels, and nothing in the record explains why Petitioner's counsel could not have obtained additional psychiatric or psychologic opinions at that time, before the first petition for habeas corpus was filed, if such additional reports were deemed necessary.

In connection with the issue of Petitioner's competence to stand trial, Petitioner also claims that he did not

receive the assistance of a competent mental health expert at trial and that trial counsel was ineffective in failing to obtain a competent mental exam. These claims were addressed and rejected in the first petition for habeas corpus, and the ends of justice do not require their reconsideration. For reasons set forth in this Court's opinion entered September 18, 1984 and the opinion of the appellate court in Adams v. Wainwright, 764 F.2d at 1367-69, trial counsel's conduct in investigating Petitioner's mental competency and deciding not to pursue a claim of incompetency did not result in prejudice to Petitioner. In addition, Ake v. Oklahoma, 105 S.Ct. 1087 (1985), is distinguishable because Petitioner never made a showing to the trial court that his competency would be a significant factor at trial.

Petitioner also relies on the

recently obtained medical reports to support a claim that the inculpatory statement he gave during his interrogation on the night of March 15, 1978 was involuntary because he was psychologically coerced. The Court concludes that this ground for relief is barred by the abuse of the writ doctrine because it was not raised in the first federal habeas petition and Petitioner has not shown that his failure to previously raise it is not attributable to inexcusable neglect or deliberate bypass.

The Court finds that this claim was intentionally abandoned because Petitioner raised it in his first Rule 3.850 motion, and after the state trial court denied that motion, Petitioner did not pursue the claim on appeal to the Florida Supreme Court or in his first habeas petition filed in this Court.

Moreover, a review of the record

regarding this interrogation, and even of the recent opinion of Dr. Koson, suggests that a decision to abandon this claim was certainly reasonable. While statements made during a period of mental incompetency are not admissible, mere emotionalism, confusion, or depression do not dictate a finding of mental incompetency. See United States v. Rouco, 765 F.2d 983, 993 (11th Cir. 1985). Petitioner's claim that his confession was inadmissible because it was obtained by trickery is similarly without merit. See United States v. Castaneda-Castaneda, 729 F.2d 1360, 1363 (11th Cir. 1984). The "totality of the circumstances" surrounding his interrogation do not indicate a finding of coercion. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973). Lastly, Petitioner's present contention that he was not given an adequate Miranda warning must fail. Once

administered properly, neither breaks in interrogation nor change in location or focus requires readministration of Miranda warnings. Wyrick v. Fields, 459 U.S. 42 (1982). Thus, even if Petitioner's counsel had had the benefit of Dr. Koson's observations that Petitioner was tired, afraid, hungry, and anxious to end the interrogation, all indications are that he justifiably concluded that an involuntary confession claim was not worthy of pursuit in the trial court, on direct appeal, or in collateral review proceedings.

Petitioner's second claim is that the trial court's repeated inaccurate and misleading assurances to the jury that it bore no responsibility for determining Petitioner's sentence rendered that sentence unreliable and violated the standards enunciated in Caldwell v. Mississippi, 105 S.Ct. 2633 (1985). This claim was not raised in Petitioner's first

habeas corpus petition. In response to the state's claim of abuse of the writ, Petitioner contends that his failure to previously raise this claim is not attributable to inexcusable neglect or intentional withholding of the claim, because Caldwell was not decided at the time of the first habeas petition.

The Court herein finds that Petitioner's claim does not derive any merit from the Caldwell decision and, therefore, the mere fact of an intervening change in the law does not excuse his failure to raise this claim previously. See Stephens v. Kemp, 721 F.2d 1300 (11th Cir. 1983). Similarly, given the Court's conclusion that Caldwell does not apply in the instant case, Petitioner cannot show cause and prejudice for his procedural default in the state courts, and Wainwright v. Sykes, 434 U.S. 880 (1977), bars consideration of this claim.

Caldwell held a death sentence invalid because the sentencing jury was led to believe that responsibility for determining the appropriateness of the death sentence rested not with the jury but with the appellate court that would later review the case. The Supreme Court found that the reliability of the death sentence had been undermined in that case because the existence of appellate review did not prevent the result that a defendant might be executed when no sentencer has ever made a determination that death was the appropriate sentence. Caldwell simply holds that the sentencer must not have a diminished sense of responsibility. Petitioner's claim that the advisory jury in the instant case felt a diminished sense of responsibility is insufficient to warrant the conclusions reached in Caldwell because, under Florida's death penalty statute, the trial

judge, not the jury, is the sole sentencer. The constitutionality of this specific aspect of Florida's capital sentencing statute was recently upheld in Spaziano v. Florida, 104 S.Ct. 3154 (1984).

Petitioner nonetheless argues that Caldwell applies because the advisory jury plays a critical role in Florida's capital sentencing scheme, citing Tedder v. State, 322 So.2d 908 (Fla. 1975). However, Tedder simply held that a trial judge may not override a jury verdict recommending life imprisonment and impose a sentence of death unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Id. at 910. Nothing in Florida law suggests that a similar presumption of correctness is due a jury recommendation of a death sentence. In sum, because the sentencer

in this case was the trial judge, and because the portions of the transcript cited by Petitioner in support of this claim reflect that the trial judge was well aware of his "awesome responsibility" in rendering Petitioner's sentence, the standards set forth in Caldwell are satisfied.

Petitioner's third claim is that the prosecutor's improper and inflammatory arguments to the jury rendered the death sentence in this case unfair and unreliable in violation of the Eighth and Fourteenth Amendments. This claim was not raised in the first habeas petition and the Court finds that failure to previously raise this issue is the result of inexcusable neglect or intentional abandonment. Despite the time constraints surrounding the preparation of the first habeas petition, Petitioner's counsel obviously had time to examine the

prosecutor's argument because he relied upon it in raising other issues for the first habeas petition. A claim of improper prosecutorial argument may be based upon the trial transcript and does not require additional time to investigate facts outside the record. Moreover, this claim does not derive any additional merit by reason of the Supreme Court's recent decision in Caldwell, supra.

Even assuming that failure to previously raise this claim does not constitute an abuse of the writ, Petitioner cannot demonstrate the requisite prejudice to overcome the procedural default bar pursuant to Wainwright v. Sykes, supra, because the Court herein concludes that this claim of improper prosecutorial argument does not warrant relief.

To obtain habeas corpus relief on the grounds of improper prosecutorial

argument, Petitioner must establish that the argument was improper and that it rendered his trial fundamentally unfair. See Donnelly v. DeChristoforo, 416 U.S. 637 (1974). The Eleventh Circuit has held that to determine whether Petitioner's trial was rendered fundamentally unfair, this Court must ascertain whether there is a reasonable probability that the outcome of the proceedings would have been different had the improper argument not been made. Bowen v. Kemp, 769 F.2d 672 (11th Cir. 1985); Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985). In making this determination, the Court should not view the improper comments in isolation, but should evaluate the improper comments in the context of the entire proceeding. Id.

Of course, the threshold issue is whether the prosecutorial comments challenged by Petitioner were improper. Petitioner alleges first that the

prosecutor improperly commented on facts not in evidence when he stated that Petitioner "said he tried to have intercourse with her but she was too small." Transcript at 443. The testimony at trial did not specifically reflect that Petitioner's reason for not having intercourse with the victim was that she was "too small," so this comment was improper.

Petitioner next objects to a few instances during the prosecutor's argument in which he gave a personal opinion on the evidence. It is undoubtedly improper for a prosecutor to give his personal opinion. See, e.g., Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985); Johnson v. Wainwright, 778 F.2d 623 (11th Cir. 1985).

Finally, Petitioner contends that the prosecutor improperly advocated the death sentence as a means of deterrence during the guilt/innocence phase and the penalty

phase of the trial. The Court finds that the referenced portion of the guilt/innocence phase of the transcript, Transcript at 1318, does not constitute an argument that the jury convict Petitioner in furtherance of deterrence goals. During the penalty phase, however, the prosecutor did advocate deterrence as a justification for the death sentence, but this advocacy was proper because deterrence is a legitimate sentencing consideration. See Bowen v. Kemp, 769 F.2d 672 (11th Cir. 1985); Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985); Collins v. Francis, 728 F.2d 1322 (11th Cir. 1984).

The Court finds that the improper aspects of the prosecutor's argument, his comment on facts not in evidence and his personal opinions, did not render Petitioner's entire trial fundamentally unfair. This Court is confident that the improper comments were too insignificant

to have any bearing on the jury's verdict.

Petitioner's fourth claim for relief is that he was denied due process of law at his sentencing because he was never provided an opportunity to review the presentence investigation report relied upon by the trial judge before sentence was imposed in violation of the standards set forth in Gardner v. Florida, 430 U.S. 349 (1977). This claim was not raised in Petitioner's first habeas petition and the Court finds that Petitioner's failure to previously make this claim is the result of inexcusable neglect or intentional abandonment.

Petitioner contends that he can prove that he never saw or read the presentence investigation report, as this is admitted by trial counsel. However, Petitioner does not explain why this fact was not and could not have been brought out earlier, and has not satisfied his burden of

establishing an excuse for his neglect.

In addition, the Court concludes that consideration of this claim is barred by the procedural default rule. Wainwright v. Sykes, supra. Petitioner has not demonstrated cause to show why this claim was not raised by objection at sentencing or on direct appeal. Both the facts and the law necessary to bring this claim were available to Petitioner at all stages of the prior proceedings. Engle v. Isaac, 456 U.S. 107 (1982). Trial counsel was certainly aware at the time of sentencing whether he had provided Petitioner a chance to review the presentence report.

Petitioner makes a related argument that trial counsel rendered ineffective assistance in failing to provide Petitioner with a copy of the presentence investigation report at sentencing. Petitioner's delay in raising this contention is also an abuse of the writ,

as petitioner has offered no excuse for failing to raise it earlier. Even if Petitioner's present counsel only recently obtained trial counsel's "admission," no explanation has been provided to show why Petitioner could not have presented the facts necessary to support this claim at the time of filing the first habeas petition.

Consideration of this claim is also barred by Petitioner's procedural default because, as noted above, Petitioner cannot demonstrate the requisite cause for his failure to raise this claim at the appropriate time in the state court proceedings.

Petitioner's fifth claim is that he was denied due process and the effective assistance of counsel because trial counsel failed to consult or call an expert to refute the testimony of the State's experts that supported findings of

premeditation and the aggravating circumstances. Petitioner contends that the jury was never made aware that certain of the State experts' conclusions had no scientific basis whatsoever because defense counsel never consulted a pathologist before trial.

In support of his contention that the testimony of the State's experts was based upon mere speculation, Petitioner relies upon the recently obtained affidavit of Dr. Robert Stivers, the Fulton County, Georgia medical examiner, attached as Appendix R to the instant petition. The Court has reviewed this affidavit and concludes that this opinion, or a similar opinion of another expert, was not necessary at trial to point out the weaknesses in the testimony of the state's experts. On cross-examination, the state's experts admitted that death by suffocation was possible, and that no one

could say with reasonable medical certainty that the cause of death was strangulation. These weaknesses in the state's evidence of premeditation were pointed out by Petitioner's trial counsel during closing arguments. Under these circumstances, if Petitioner's trial counsel did indeed fail to consult an expert, this failure did not deprive Petitioner of "an adequate opportunity to present [his] claims fairly within the adversarial system." Ake v. Oklahoma, 105 S.Ct. 1087 (1985). Because trial counsel's cross-examination was effective to undermine the state's expert testimony, counsel was not ineffective for failure to further investigate this testimony, see Strickland v. Washington, 104 S.Ct. 2052, 2066 (1984), and the defense did not suffer any prejudice from counsel's performance.

Finally, in view of the Court's

conclusion that this claim is without merit, Petitioner cannot show the requisite cause and prejudice for his failure to raise this claim in the appropriate state court proceedings, and this claim is barred from consideration by Wainwright v. Sykes, supra.

Petitioner's sixth claim is that the evidence was insufficient to convince any rational trier of fact of his guilt and of the existence of aggravating circumstances beyond a reasonable doubt. The Court finds that failure to raise this claim in the first habeas petition constitutes an abuse of the writ. As is true with Petitioner's claim regarding improper prosecutorial argument, time restraints do not excuse Petitioner's neglect in failing to previously raise this issue because its viability could have been ascertained simply by reviewing the trial transcript and the applicable law.

Even if Petitioner's neglect were excusable, this ground for relief would be barred because Petitioner cannot show prejudice for his procedural default. Wainwright v. Sykes, supra. The Court has thoroughly reviewed the transcript of Petitioner's trial, viewing the evidence in the light most favorable to the prosecution, and finds sufficient evidence therein of premeditation to convince a rational trier of fact of Petitioner's guilt beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307 (1979). Assuming, without deciding, the correctness of Petitioner's contention that a federal habeas court must review the sufficiency of the evidence to support the aggravating circumstances found by the sentencer, the Court finds that sufficient evidence exists in the record to support the trial court's finding of the three statutory aggravating circumstances.

Petitioner's seventh claim for relief is that his sentencing proceeding was unconstitutional because: (1) there was a lack of adversarial testing and presentation of evidence at sentencing; (2) there was a lack of argument for Petitioner's life at sentencing; and (3) there was a lack of deliberative consideration by the trial court.

Petitioner raised these first two contentions in his first habeas corpus petition in the form of a claim that counsel rendered ineffective assistance at sentencing. The ends of justice do not warrant reconsideration of these arguments because they are entirely without merit. Although Petitioner proffers the opinions of Drs. Koson and Chaknis to show that substantial mitigating evidence about his character and background exists, this Court's prior opinion reveals that much of this evidence was actually introduced at

the sentencing phase of Petitioner's trial and the trial court consequently made findings of three mitigating circumstances, including that Petitioner was under the influence of extreme mental or emotional disturbance at the time he committed the offense. Thus, presentation of these aspects of this claim in this successive petition constitutes an abuse of the writ.

Petitioner's third contention that the trial court did not give deliberative consideration to the mitigating evidence was not specifically raised in the first habeas petition, and Petitioner has not shown that this omission did not result from inexcusable neglect or deliberate bypass. Petitioner's sole basis for this serious allegation is that the trial judge entered findings of fact identical to those submitted by the prosecution.

Petitioner asserts that failure to

previously present this argument is excusable because the identity of the trial judge's findings and those offered by the prosecutor was unknown at the time of filing the first federal habeas petition. The Court finds that this contention is too frivolous to require consideration in this successive petition. Even assuming the trial judge adopted the state's written findings of fact verbatim, this fact does not in any way suggest that the trial judge failed to give deliberative consideration to his findings. As noted previously herein, the record is replete with indications that the trial judge fully recognized his grave responsibility in sentencing Petitioner to death.

Petitioner's eighth and final ground for relief is that he was denied due process of law by virtue of the death-qualification voir dire procedure

undertaken at the commencement of his trial. Petitioner argues that exposure to death-qualifications rendered the jurors predisposed to find him guilty. The Court finds that Petitioner's failure to make this claim in his first habeas petition constitutes an abuse of the writ, and rejects Petitioner's contention that his neglect in raising this issue is excusable because the claim is based upon an intervening change in the law.

The present law governing Petitioner's habeas petition has not been changed to provide that exposure to death-qualification voir dire procedure unconstitutionally predisposes jurors to find the defendant guilty. Petitioner cites no binding precedent or persuasive authority to support his claim, although he seeks to rely on the recent Eighth Circuit case of Griqsby v. Mabry, 758 F.2d 226 (8th cir. 1985), which is presently

pending before the United States Supreme Court. However, the instant claim is significantly different from the issue raised and decided in Griqsby. Petitioner is not here alleging that jurors with qualms about the death penalty were challenged for cause and excluded from the guilt/innocence phase of the trial, thus depriving him of a jury which represents a fair cross-section of the community.

In sum, the Court concludes that the claims raised in this successive Petition are barred from consideration by the abuse of the writ doctrine and by Petitioner's procedural default in the state courts. Moreover, the Court is satisfied that its failure to consider these claims will not result in a miscarriage of justice because the merits of these claims are far from compelling. Accordingly, the Court now

ORDERS and ADJUDGES:

1. That the Petition for Writ of

Habeas Corpus, filed herein on March 5, 1986, is hereby DENIED;

2. That the Motion for Evidentiary Hearing on Abuse of the Writ Issue, filed herein on March 5, 1986, is hereby DENIED;

3. That the Motion for Stay of Execution, filed herein on March 6, 1986, be and the same is hereby DENIED.

4. That Petitioner is hereby granted leave to appeal in forma pauperis pursuant to 28 U.S.C. § 1915;

5. That this Court hereby issues a certificate of probable cause to appeal pursuant to 28 U.S.C. § 2253 and Fed. R. App. P. 22(b), this decision; and

6. That the Clerk of the Court shall enter Judgment dismissing this action.

DONE and ORDERED in Chambers at Jacksonville, Florida this 7th day of March, 1986, at 6:00 p.m. o'clock.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-3207

AUBREY DENNIS ADAMS, JR.,

Petitioner-Appellant,

versus

RICHARD L. DUGGER, ROBERT BUTTERWORTH,

Respondents-Appellees.

Appeal from the United States District
Court for the Middle District of Florida

(April 23, 1987)

ON PETITION FOR REHEARING

(Opinion Nov. 13, 1986,
11 Cir., ___ F.2d ___).

Before RONEY, Chief Judge, FAY and
JOHNSON, Circuit Judges.

PER CURIAM:

Part I(A)(2), entitled "Procedural
Bar," is hereby vacated and the following

is substituted in lieu thereof:

2. Abuse of the Writ and Procedural Bar

A district court need not consider a claim raised for the first time in a second habeas petition, unless the petitioner establishes that the failure to raise the claim earlier was not the result of intentional abandonment or withholding or inexcusable neglect. Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts; Witt v. Wainwright, 755 F.2d 1396, 1397 (11th Cir. 1985). Consideration of a claim also can be barred by failure to comply with state procedural rules, absent a showing of cause for, and prejudice resulting from, such failure. Wainwright v. Sykes, 433 U.S. 72, 87 (1977); accord, Engle v. Isaac, 456 U.S. 107, 110 (1982).

Because the district court's determination that Adams' failure to raise his Caldwell claim in his first habeas

petition and its determination that the claim was procedurally barred both were based on the district court's erroneous conclusion that Caldwell was inapplicable, the district court clearly abused its discretion in finding abuse of the writ and procedural bar on that basis. Further, as discussed below, we find that neither the abuse of the writ doctrine nor procedural bar precludes our consideration of the merits of this claim.

a. Abuse of the Writ

We find no evidence that Adams' failure to raise this claim in his earlier petition was the result of inexcusable neglect or deliberate withholding. The Caldwell decision, upon which the claim is based, clearly was not available to Adams at the time he filed his first petition in September 1984. Indeed, the Supreme Court did not grant certiorari in Caldwell until after the district court had denied Adams'

first petition. Cf. Bowden v. Kemp, 793 F.2d 273, 275 & n. 4 (11th Cir 1986) (finding abuse of the writ when previous petition was filed after the Supreme Court had granted certiorari in case upon which petitioner relied). Nor is the Eighth Amendment argument raised by Adams in this petition one of which he should have been aware at the time of filing his first petition. This claim is not one which had been raised and considered in a number of other cases at the time of that petition. Cf. Witt, 755 F.2d at 1398 (finding abuse of the writ when claim raised in case upon which petitioner relied "had been raised long before [that] case" so that failure to present the claim in his first petition was "necessarily attributable to abandonment or inexcusable neglect").

Nor did Supreme Court precedent at the time of Adams' first habeas petition

make it evident that statements such as those made by the trial judge in this case implicated the Eighth Amendment. In fact, if anything, that precedent indicated that the contrary was true. In California v. Ramos, 463 U.S. 992 (1983), the Supreme Court decision most relevant to Adams' claim before Caldwell, the Supreme Court found "no constitutional defect" under the Eighth Amendment in a jury instruction that informed jurors of the California governor's power to commute a life sentence without possibility of parole to a lesser sentence that included the possibility of parole. Id at 994. In doing so, the Court rejected petitioner's arguments that such an instruction created an unacceptable level of unreliability in the capital sentencing determination, that it deflected the jury from its task of basing the penalty decision on the character of the defendant and the nature

of the offense, and that the instruction was misleading because it did not inform the jury that the governor also could commute a death sentence. Id. at 998. The Court indicated that, although its previous Eighth Amendment decisions had placed some substantive limits on the particular factors that a capital sentencing jury may consider in determining whether death is appropriate, the principal concern of the Court's Eighth Amendment jurisprudence had been "with the procedure by which the State imposes the death sentence [rather] than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the defendant falls within the category of persons eligible for the death penalty." Id. at 999 (emphasis in original). Except for the specific substantive limitations imposed by its

previous decisions, none of which the Court found were applicable to the jury instruction at issue in Ramos, the Court stated that it had "deferred to the State's choice of substantive factors relevant to the penalty determination." Id. at 1001. Further, in rejecting the contention that the instruction was misleading because of its failure also to inform jurors of the governor's power to commute a death sentence, the Court recognized that an instruction regarding the power to commute a death sentence "may incline [the jury] to approach their sentencing decision with less appreciation for the gravity of their choice," but stated that, given its holding that informing the jury of the commutation power did not implicate the Constitution, the Court's statements should not be read as suggesting that "the Federal Constitution prohibits an instruction

regarding the Governor's power to commute a death sentence." Id. at 1011-12 & n. 27.¹

The abuse of the writ doctrine should be "of rare and extraordinary application." Paprskar v. Estelle, 612 F.2d 1003, 1007 (5th Cir.), cert. denied, 449 F.2d 885 (1980). We do not find its application warranted with regard to this

¹ In reaching its decision in Caldwell, the Court found it necessary to distinguish Ramos, which had been relied upon by the Mississippi Supreme Court in upholding Caldwell's death sentence. Caldwell, 105 S.Ct. at 2643. In fact, both the majority and the dissent on the Mississippi Supreme Court had interpreted Ramos as "leav[ing] the decision of whether to inform the jury of extraneous matters with the individual states." Caldwell v. State, 443 So.2d 806, 816 (Miss. 1983), rev'd in part, Caldwell v. Mississippi, 105 S.Ct. 2633 (1985) (Lee, J., dissenting); id. at 813. Their disagreement was over whether there was reversible error as a matter of state law. See id. at 816.

claim.²

² We note that statements regarding appellate review such as those involved in Caldwell had been held to be reversible error as a matter of state law by a number of states. Caldwell, 105 S.Ct. at 2642. In fact, several pre-Furman cases in Florida held that remarks by the trial judge or the prosecutor regarding appellate review constituted reversible error. E.g., Pait v. State, 112 So.2d 380, 383-85 (Fla. 1959) (prosecutorial statements regarding appellate review held reversible error); Blackwell v. State, 79 So. 731, 735-36 (Fla. 1918) (prosecutorial comments regarding appellate review approved by trial judge held reversible error). The fact a practice may be condemned as a matter of state law, however, does not indicate that the same practice constitutes an Eighth Amendment violation. As the Supreme Court noted in Ramos, "States are free to provide greater protections in their criminal justice system than the Federal Constitution requires." 463 U.S. at 1014.

Further, at the time of Adams' first habeas petition, this Circuit had considered the argument that prosecutorial and judicial comment on the appellate process rendered a petitioner's trial fundamentally unfair in violation of the due process clause of the Fourteenth Amendment. E.g., Corn v. Zant, 708 F.2d 549, 557 (11th Cir. 1983), cert. denied, 467 U.S. 1220 (1984) (judge's reference to right of automatic appeal did not render trial fundamentally unfair); McCorquodale v. Balkcom, 705

F.2d 1553, 1556 (11th Cir. 1983), rev'd on reh'g en banc on other grounds, 721 F.2d 1493 (1984), cert. denied, 466 U.S. 954 (1984) (prosecutor's remark regarding appellate review did not render trial fundamentally unfair). The fact Adams may have had a basis for raising a due process claim by analogy to these decisions at the time of his first habeas petition, however, does not indicate that his failure to raise the Eighth Amendment claim he now raises was the result of intentional abandonment or inexcusable neglect. It is clear that not every claim that implicates the fundamental fairness standards embodied in the due process clause necessarily implicates the Eighth Amendment as well. Indeed, although both Corn and McCorquodale were capital cases, neither gives any indication that the Eighth Amendment is implicated by statements regarding appellate review. Both assume that the proper analysis of such a claim is under the fundamental fairness standard of the due process clause as enunciated in Donnelly v. DeChristoforo, 416 U.S. 637 (1974). The distinction between claims that implicate the fundamental fairness standards embodied in the due process clause and those that implicate the Eighth Amendment has been recognized from the inception of the Supreme Court's modern Eighth Amendment jurisprudence. The year before the Supreme Court held in Furman v. Georgia, 408 U.S. 238 (1972), that Georgia's death penalty statute violated the Eighth Amendment, the Court rejected the contention that discretion

b. Procedural Bar

Adams' Caldwell claim was raised for the first time in state court in his second 3.850 motion. The Florida Supreme Court refused to consider the merits of that claim because it had not been raised

in imposing the death penalty violated the fundamental fairness standards embodied in the due process clause of the Fourteenth Amendment. McGautha v. California, 402 U.S. 183 (1971). See Lockett v. Ohio, 438 U.S. 586, 599 (1978) (plurality opinion) ("Thus, what had been approved under the Due Process Clause of the Fourteenth Amendment in McGautha became impermissible under the Eighth and Fourteenth Amendments by virtue of the judgment in Furman"). In fact, the three dissenting justices in Caldwell argued that the claim involved in that case did not implicate the Eighth Amendment and should have been analyzed instead as a due process claim. Then Justice Rehnquist stated that he found "unconvincing the Court's scramble to identify an independent Eighth Amendment norm that was violated by the statements" in Caldwell, and argued that the Court's inquiry should have been the due process inquiry as to "whether the statements rendered the proceedings as a whole fundamentally unfair." 105 S.Ct. at 2650 (Rehnquist, J., dissenting) (joined by Burger, C.J., and White, J.).

on direct appeal. Adams, 484 So.2d at 1217.³ Failure to comply with an independent and adequate state procedural rule ordinarily precludes federal habeas review of a claim, absent a showing of cause for, and prejudice resulting from, the procedural default. Sykes, 433 U.S. at 87, Spencer v. Kemp, 781 F.2d 1458, 1463 (11th Cir. 1986) (en banc). It is doubtful, however, that an adequate and independent state law ground is present in this case.

³ The state asserts that the Supreme Court held this claim barred both because of Adams' failure to raise it on direct appeal and because Adams' failure to raise it in his first 3.850 motion constituted an abuse of the 3.850 procedure. This interpretation of the Florida Supreme Court's decision is not supported by the language of that opinion. That language makes it clear that the Florida Supreme Court applied abuse of ~~the~~ 3.850 procedure to bar claims that "ha[d] been considered and ruled upon in the previous motion for post-conviction relief." 484. So.2d at 1217. Adams' Caldwell claim was not raised in his prior 3.850 motion.

Under Florida law, claims based on constitutional changes in the law since the time of a petitioner's direct appeal of sufficient magnitude to warrant retroactive application are cognizable in Rule 3.850 proceedings, Witt v. State, 387 So.2d 922, 929 (Fla.), cert. denied, 449 U.S. 1067 (1980); Tafero v. State, 459 So.2d 1034, 1035 (Fla. 1984) (finding Enmund v. Florida, 458 U.S. 782 (1982), a change in law cognizable in post-conviction proceedings); Edwards v. State, 393 So.2d 597, 600 n.4 (Fla. App.), petition denied, 402 So.2d 613 (Fla. 1981) (finding Cuyler v. Sullivan, 446 U.S. 335 (1980), a change in law cognizable in post-conviction proceedings), as are claims involving fundamental errors, despite the failure to raise such claims on direct appeal. E.g., Palmer v. Wainwright, 460 So.2d 362, 365 (Fla. 1984) (suppression of

evidence is fundamental error cognizable in collateral proceedings); Nova v. State, 439 So.2d 255, 261 (Fla. App. 1983) (infringement of right to jury trial held fundamental error); Reynolds v. State, 429 So.2d 1331, 1333 (Fla. App. 1983) (sentencing error that could cause defendant to be incarcerated for greater length of time than provided by law is fundamental and "petitioner is entitled to relief in any and every legal manner possible"). In fact, Adams' Caldwell claim is the very type of claim for which Florida created the Rule 3.850 procedure. See Witt, 387 So.2d at 927 (genesis of Rule 3.850 procedure was Florida's desire to provide a mechanism for petitioners to raise challenges based on major constitutional changes in the law "where unfairness was so fundamental in either process or substance that the doctrine of finality had to be set

aside"). Therefore, the Florida Supreme Court's holding that Adams' Caldwell claim is barred for failure to raise it on direct appeal either must rest on an incorrect determination as to the applicability of Caldwell, or represents application of a procedural bar with regard to a type of claim that Florida does not regularly and consistently bar. See Ake v. Oklahoma, 470 U.S. 68, 74-75 (1985) (when application of state procedural bar depends on an antecedent ruling as to whether federal constitutional error has been committed there is no independent and adequate state law ground); Spencer, 781 F.2d at 1470 (state procedural rule that is sporadically applied is not independent and adequate state ground).

Further, we find that Adams has established cause and prejudice for any procedural default resulting from his

failure to raise this claim on direct appeal. When "a constitutional claim is so novel that its legal basis is not reasonably available to counsel" at the time of a petitioner's procedural default, the petitioner has cause for the failure to raise the claim in accordance with the state procedural rule. Reed v. Ross, 468 U.S. 1, 16 (1984). Conversely, when the "tools to construct [a] constitutional claim" are available, then the claim is not sufficiently novel to constitute cause for failure to comply with state procedural rules because "[w]here the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default." Engle, 456 U.S. at 133-34. "[T]he question is not

whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all." Smith v. Murray, 106 S.Ct. 2661, 2667 (1986). Because we find that Adams' Caldwell claim was so novel at the time of Adams' trial in October 1978 and his sentencing and appeal in early 1979 that its legal basis was not reasonably available at that time, we find that Adams has established cause for any procedural default.

The Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), "drastically altered the constitutional framework in which a citizen in this country can be executed." Ford v. Strickland, 734 F.2d 538, 539 (11th Cir.), aff'd sub nom. Wainwright v. Ford, 467 U.S. 1220 (1984). In the wake of that decision, the states were

required to reevaluate and revise their death penalty statutes. Thus, in a very real sense, Furman is a watershed in Eighth Amendment jurisprudence. Furman itself, however, "engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment." Lockett v. Ohio, 438 U.S. 586, 599 (1978) (plurality opinion).

Between the time Florida enacted its new death penalty statute in late 1972 in an attempt to comply with the Eighth Amendment requirements of Furman and the time of Adams' trial and sentencing, the Supreme Court had issued several decisions that began to give some shape to the Eighth Amendment concerns expressed in Furman. In Gregg v. Georgia, 428 U.S. 153 (1976), and its

companion cases,⁴ the Supreme Court considered Eighth Amendment issues posed by five of the post-Furman death penalty statutes. The Court's principal concern in these cases, however, was "more with the procedure by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the defendant falls within the category of persons eligible for the death penalty." Ramos, 463 U.S. at 999 (emphasis in original). Thus, Gregg "did not undertake to dictate to the State the particular substantive factors that should be deemed relevant to the capital sentencing decision," stating instead

⁴ Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

that "'the problem [of channeling jury discretion] will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." Ramos, 463 U.S. at 999-1000 (quoting Gregg, 428 U.S. at 192) (brackets in original) (emphasis in original).

By the time of Adams' trial, however, the Supreme Court had placed some substantive limitations on the factors that a capital sentencing jury could consider in determining whether death was appropriate:

In Gregg itself the joint opinion suggested that excessively vague sentencing standards might lead to the arbitrary and capricious sentencing patterns condemned in Furman. 428 U.S. at 195 n. 46. Moreover, in Woodson v. North Carolina, 428 U.S. 280 (1976), the plurality concluded that a

State must structure its capital sentencing procedure to permit consideration of the individual characteristics of the offender and his crime. This principle of individualization was extended in Lockett v. Ohio, 438 U.S. 586 (1978), where the plurality determined that "the Eighth and Fourteenth Amendments require that the sentencer [in a capital case] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Finally, in Gardner v. Florida, 430 U.S. 349 (1977), a plurality of the Court held that a death sentence may not be imposed on the basis of a presentence investigation report containing information that the defendant has had no opportunity to explain or deny.

Ramos, 463 U.S. at 1000-01 (brackets in original) (emphasis in original) (footnotes omitted). Beyond these limitations, however, the Court's Eighth Amendment jurisprudence "deferred to the

State's choice of substantive factors relevant to the penalty determination." Id. at 1001. None of these cases indicated that prosecutorial comments or statements by a trial judge to the jury, other than those that limited the mitigating factors that could be considered, implicated the Eighth Amendment prohibition against cruel and unusual punishment.

Further, critical to the Court's analysis in Caldwell is its conclusion that "[i]n the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." Caldwell, 105 S.Ct. at 2640. As discussed below, much of the Caldwell Court's rationale for this conclusion

applies with equal force to the danger of bias in favor of the death penalty from statements such as those made by the trial judge in this case. At the time of Adams' procedural default, however, Supreme Court comment on the effect that a Florida jury's awareness of its advisory role would have on its sentencing decision indicated that a diminished sense of responsibility on its part would incline it towards leniency rather than towards imposition of the death penalty. In Dobbert v. Florida, the Court rejected an ex post facto challenge to application of the new Florida death penalty statute to a crime occurring before its enactment, finding the change in the Florida law to be both procedural and ameliorative. 432 U.S. 282, 294 (1977). The Court found the petitioner's argument that the jury would have recommended life under the old death

penalty statute, as it had under the new, unpersuasive because "the jury's recommendation may have been affected by the fact that the members of the jury were not the final arbiters of life or death" and "may have chosen leniency when they knew that that decision rested ultimately on the shoulders of the trial judge, but might not have followed the same course if their vote were final." Id. at 294 & n.7.⁵

Our conclusion that Eighth Amendment jurisprudence at the time of Adams' procedural default did not provide a reasonable basis for the claim he now makes is supported by the fact that the state has not cited to, nor have we

⁵ Indeed, the dissent in Caldwell describes as "conjecture" the majority's determination that "the jury would...have 'delegated' its responsibility by erring in favor of imposing the death penalty." Caldwell, 105 S.Ct. at 2650 (Rehnquist, J., dissenting).

found, any decisions indicating that this type of Eighth Amendment claim was being raised at that time.⁶ In Engle, as evidence of the reasonableness of the legal basis for raising the Mullaney issue involved in that case at the time of the petitioner's procedural default, the Court "emphasized that 'dozens of defendants relied upon [In re Winship] to

⁶ The state argues that pre-Furman cases in Florida holding that remarks by the trial judge and the prosecutor regarding appellate review constituted reversible error as a matter of state law provided a reasonable basis for Adams' Eighth Amendment claim. As we indicated in connection with our discussion of abuse of the writ, see note 2 supra, the mere fact a practice may be condemned as a matter of state law does not indicate that it also constitutes an Eighth Amendment violation. Similarly, despite the state's argument to the contrary, the Tedder decision itself clearly did not provide a reasonable basis for raising this claim, as Tedder dealt only with the weight to be given the jury's recommended sentence and not with the Eighth Amendment implications of statements that diminish the jury's sense of responsibility for its sentence.

challenge the constitutionality of rules [similar to that petitioner was challenging in Engle]' " and that numerous courts had agreed with these arguments. Reed, 468 U.S. at 19-20 (quoting Engle, 456 U.S. at 131-32). The Reed Court found the fact similar challenges were not being made and considered at the time the petitioner in Reed defaulted with regard to that same issue a "crucial respect" distinguishing the conclusion in Reed that there was no reasonable basis for raising the Mullaney issue at the time of the procedural default in Reed from the Engle Court's conclusion that a reasonable basis was present.

Id. ⁷

In this case, as in Reed, claims similar to Adams' were not being raised at the time of his failure to raise this issue, despite the state's assertion that this Court's decision in this case will affect numerous cases already litigated in Florida and despite the number of Caldwell claims now being presented to this Court. As the Court noted in Engle, the fact a reasonable basis exists for a claim does not mean that every competent lawyer necessarily will raise that claim. 456 U.S. at 133-34. However, the fact no

⁷ The Reed Court did note that some authority on analogous issues did exist at the time of the petitioner's default in that case. The Court found, however, that because these cases provided only indirect support for the petitioner's claim and because they were the only cases that would have supported the claim at all, it could not conclude that they provided a reasonable basis upon which the petitioner "could have realistically appealed this conviction." 468 U.S. at 18-19.

one was raising the claim Adams now raises at the time of his trial and appeal certainly is an indication that the claim was so novel as to have no reasonable basis in existing precedent.

Because the legal basis for Adams' Caldwell claim was not reasonably available to him at the time of his trial in October 1978 and his sentencing and appeal in 1979, we find that he has established cause for his failure to raise that claim on direct appeal.⁸

⁸ In Reed, the Supreme Court recognized that "whether an attorney has a 'reasonable basis' upon which to develop a legal theory may arise in a variety of contexts" and, therefore, did not attempt to delineate those situations. 468 U.S. at 17. Instead, it confined its analysis to the specific situation presented in Reed: "one in which th[e Supreme] Court has articulated a constitutional principle that had not been previously recognized but which is held to have retroactive application." Id. In analyzing the Mullaney claim at issue in Reed, the Court discussed three situations that the Court previously had identified in the retroactivity context

as times when a new constitutional rule representing a "clear break with the past" might emerge from the Supreme Court: (1) a Supreme Court decision might overrule prior Supreme Court precedent, (2) a decision might "'overtur[n] a longstanding and widespread practice to which [the Supreme Court] has not spoken, but which a near-unanimous body of lower court authority has expressly approved,'" and (3) a decision might "'disapprov[e] a practice th[e] Court arguably has sanctioned in prior cases.'" Id. (quoting United States v. Johnson, 457 U.S. 537, 549, 551 (1982)). The Reed Court, however, did not state that these situations were the exclusive means by which a petitioner could establish that there was no reasonable basis for his claim at the time of his procedural default. Indeed, as discussed above, the Court clearly recognized that a number of situations could give rise to "cause" based on lack of a reasonable basis for a claim.

There are significant differences between Adams' Caldwell claim and the Mullaney claim at issue in Reed which suggest that the present situation is not sufficiently like that involved in Reed to warrant an analysis in terms of the three situations discussed in Reed as constituting a "clear break with the past." The Mullaney claim at issue in Reed was a due process claim and, therefore, could be analyzed in terms of a long history of consideration by the Supreme Court as well as the lower courts. Adams' Eighth Amendment claim, however, involves an area of law that has no similar "past." The Supreme Court's decision in Furman was only six years old

at the time of Adams' trial and the statute under which he was sentenced, as well as all modern death penalty statutes, had a similarly brief history. The Reed Court's analysis of the Mullaney issue before it thus assumes a past in the form of a long decisional history that simply is not present in the Eighth Amendment context. It is in fact this lack of any past decisional history indicating that the issues raised by Adams' Caldwell claim were even addressed by the Eighth Amendment that gives rise to "cause" in this case.

Nevertheless, even assuming that our analysis should proceed in terms of the three situations outlined in Reed, the clear indication of the Eighth Amendment decisions at the time of Adams' trial and appeal that the primary concern of the Eighth Amendment was with the procedures by which the death penalty was imposed, rather than with the particular substantive factors considered by the jury in reaching its decision, and the suggestion by the Supreme Court in Dobbert that statements to a Florida jury that they were not the final arbiter of life and death would bias them in favor of leniency rather than death, certainly can be said to have "arguably sanctioned" statements such as those made by Adams' trial judge for purposes of their consistency with the requirements of the Eighth Amendment.

Further, Adams also was prejudiced by the failure to raise this claim. As discussed below, the judge's statements to Adams' jury clearly violated the principles enunciated in Caldwell, thereby creating an impermissible danger that the jury's recommended sentence was unreliable and, consequently, that Adams' death sentence was unreliable.⁹

⁹ The state argues that prejudice cannot be demonstrated because (1) the judge's comments were a correct assessment of Florida law, (2) the judge's instructions to the jury as to aggravating and mitigating factors and their weighing would make it clear the jury should render its advisory sentence on the individual circumstances of the case and (3) the comments were made during voir dire, when the judge was merely trying to give the prospective jurors some sense of the sentencing structure.

As discussed above, however, the judge's comments were misleading because they left the jury with a false impression as to the significance of its role in the sentencing process. Further, the judge's instructions regarding mitigating and aggravating circumstances did not cure the misleading statements, because there was no withdrawal or

With the above modification of the previously published opinion, the Petition for Rehearing is DENIED.

correction of those statements. Cf. Caldwell, 105 S.Ct. at 2645 n. 7 (prosecutor's later statements that jury played important role did not cure misleading statements because prosecutor did not retract or undermine those statements). Although the trial judge instructed the jury during the penalty phase not to "act hastily or without due regard to the gravity of these proceedings" and told it to "carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake," nothing he said corrected the misunderstanding as to the significance of the jury's recommendation engendered by his earlier statements. In fact, at the beginning of the penalty phase, the judge reinforced his prior comments by stating that "the final decision as to what punishment shall be imposed rests solely upon the Judge of this Court." He also made a similar remark at the beginning of the penalty phase jury instructions. Further, the fact the jury heard these statements during voir dire does not mean that the statements did not influence the jury. These statements were not isolated, insignificant comments. They were made by the judge at a time when he purportedly was informing the prospective jurors as to their role in the trial, the statements were made repeatedly, and the judge informed the prospective jurors that the substance of these statements

was "the most important thing to remember
in Phase Two."

THIS IS A CAPITAL CASE
EXECUTION IS SCHEDULED FOR
THURSDAY, AUGUST 11, 1983

Prisoner's Name: ALVIN R. MOORE, JR.

Prison Number: 97556

Place of Confinement:
LOUISIANA STATE PENITENTIARY
ANGOLA, LOUISIANA

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

ALVIN R. MOORE, JR.,

Petitioner,

v.

ROSS MAGGIO, Warden,
Louisiana State Penitentiary,
Angola, and the ATTORNEY GENERAL
OF THE STATE OF LOUISIANA,

Respondents.

PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY

To the Honorable Tom Stagg, United States
District Judge for the Western District
of Louisiana, Shreveport Division:

GROUND II

Petitioner's death sentence was unconstitutionally imposed in violation of the Eighth and Fourteenth Amendments to the United States Constitution as the result of the Louisiana Supreme Court's failure to engage in a meaningful excessiveness review designed to assure that death is the appropriate sentence.

88. The Supreme Court of the United States has upheld the constitutionality of capital punishment statutes "on their faces" only upon the assumption that they provided for meaningful and effective appellate review that would function adequately to prevent arbitrariness in capital sentencing, including review procedures through which a state supreme court could compare each capital case with other cases to determine whether the sentence in the case under consideration was excessive or disproportionate to that administered in other similar cases. Gregg v. Georgia, 428 U.S. 153, 166-67

(1976).

89. The excessiveness review engaged in by the Louisiana Supreme Court on the direct appeal from petitioner's conviction and sentence of death falls far short of the type of review mandated by the Eighth and Fourteenth Amendments. Pursuant to La.C.Cr.P., Art. 905.9 and Supreme Court Rule 28, the Court is required to review the death sentence to determine whether it is excessive in light of the following factors:

- (1) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors;
- (2) whether the evidence supports the jury's finding of a statutory aggravating circumstance; and
- (3) whether the sentence is

disproportionate to the
penalty imposed in similar
cases.

The Court's consideration of each of these factors is superficial at best. In addition, the Court fails to conduct its review of each individual factor in light of the others in determining whether death is excessive. The result is a constitutionally ineffective excessiveness review in no way designed to assure reliability in sentencing determinations.

1. Passion, prejudice or other arbitrary factors.

90. The Court determined that petitioner's death sentence was not imposed as the result of passion, prejudice or any other arbitrary

factor. This conclusion was based on two findings: (1) that the prosecution's references to appellate review of the jury's sentence, "although close to reversible error, did not induce the jury to believe that its responsibility was lessened by appellate review," and (2) the jury was not influenced by prejudice since there was "no reference at any point in the record to color, or appeal to racial prejudice." State v. Moore, 414 So.2d at 347. In making these findings, the Court utterly fails to appreciate the risk that the decision to vote for death was influenced by the reference to appellate review or racial prejudice.

91. At the sentencing phase of petitioner's trial, the prosecution concluded his closing argument to the jury as follows:

...there is only one penalty

really available for this type crime and that is the death penalty. This is where it will begin. From the next point forward it goes through the court system to be thoroughly reviewed and checked, through every court in this land. But it has to begin here, right here with the jury. And it's not an easy thing to ask for and it's not an easy thing for you to give. But if we are going to stop this type of useless and senseless violence against people there is only one way to stop it, and that's right here. Thank you. [R. at 766, emphasis added.]

Immediately thereafter, the defense attorney gave his brief closing statement in which he concluded in like manner:

The mistake can be corrected, no doubt, but I ask you to give it your most serious consideration in the next short length of time, and determine that the death penalty would not be proper in this case. Thank you. [R. at 776, emphasis added.]

In his charge to the jury on the law, the judge made no statement to the jury that these remarks should be disregarded or

or that the prosecutor's reference to a review of the jury's sentence by "every court in this land" was misleading and inaccurate.

92. In its recent decision in California v. Ramos, 33 Cr.L. 3306 (U.S., July 6, 1983), the United States Supreme Court recognized the risks inherent in a procedure whereby the jury is informed of the extent of the review of its sentencing decision. As the Court stated:

Advising jurors that a death verdict is theoretically modifiable, and thus not "final," may incline them to approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencer.

Ramos, 33 Cr.L. at 3312. The statements made by the prosecutor and reinforced by defense counsel regarding the extent of review of the jury's sentencing decision

are just the sort of statements that have the effect of inducing the jurors to disregard the seriousness of their responsibility. With the insertion of these statements in the sentencing proceeding, an unacceptable risk was created that death would be imposed arbitrarily and capriciously. The imposition of petitioner's death sentence in the face of this risk is not constitutionally acceptable. Lockett v. Ohio, 438 U.S. 586, 605 (1978) (Burger, C.J.); Gregg v. Georgia, 428 U.S. 153, 188, 206-07 (1976) (plurality opinion); see also, State v. Willie, 410 So.2d 1019, 1035 (La. 1982). The Court's failure to appreciate this risk rendered its excessiveness review meaningless.

C E R T I F I C A T E

I CERTIFY that a copy of the foregoing Petition for a Writ of Habeas Corpus by a Person in State Custody, Motion for Stay of Execution, and Memorandum in Support was sent by certified mail to Mr. Ross Maggio, Warden, Louisiana State Penitentiary at Angola, Louisiana, and Honorable William J. Guste, Attorney General of the State of Louisiana, P.O. Box 44005, Baton Rouge, Louisiana 70821, on this ____ day of August, 1983.

WELLBORN JACK, JR.

IN THE
SUPREME COURT
OF
THE UNITED STATES

OCTOBER TERM, 1983

NO.

BOBBY CALDWELL,

Petitioner,

- against -

THE STATE OF MISSISSIPPI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MISSISSIPPI SUPREME COURT

E. THOMAS BOYLE, P.C.
Attorney for Petitioner
27 West Main Street
P.O. Box 846
Smithtown, New York 11787
(516) 265-1166

April 19, 1984

REASONS FOR GRANTING THE WRIT

I. THE PROSECUTOR'S ARGUMENT THAT THE JURY'S IMPOSITION OF THE DEATH PENALTY IS NON-FINAL AND SUBJECT TO APPELLATE REVIEW UNCONSTITUTIONALLY DIMINISHED THE JURY'S RESPONSIBILITY TO IMPOSE AN INDIVIDUALIZED SENTENCE IN A CAPITAL CASE

This case presents an issue that the Court has never determined: the constitutional limits of prosecutorial argument aimed at lessening the jury's responsibility in returning a sentence of death. The prosecutor argued - and the trial court condoned - comments that the jury's determination imposing the death penalty was "not the final decision" and was "automatically reviewable" by the State's highest court.*

* A similar argument was made by the prosecutor in Maggio v. Williams, U.S. , 104 S.Ct. 311 (1983), however defense counsel there failed to object and the Court refused to consider the error on habeas corpus review. In a concurring opinion however, Justice Stephens addressed the merits of the issue and stated:

While the Mississippi Supreme Court split 4-4 on this issue, all 8 of the judges agreed that under Ramos v. California, U.S. , 103 S.Ct. 3446 (1983), this issue was void of constitutional overtones and therefore should be decided strictly as a matter of state law.

California v. Ramos, U.S. , 103 S.Ct. 3446 (1983) involved the constitutionality of instructions to the jury at the sentence phase that apprised

In my opinion, the argument was prejudicial to the accused, both because it appears to have misstated the law and because it may have led the jury to discount its grave responsibility in determining the defendant's fate. A prosecutor should never invite a jury to err because the error may be corrected on appeal. That is especially true when the death penalty is at stake. Maggio v. Williams, supra, U.S. , 104 S.Ct. at 316 (concurring opinion, Justice Stephens).

the jury that the defendant was subject to parole in the event that life imprisonment was imposed. The Court held that this was accurate information which enabled the jury to fulfill its obligation in meting out the appropriate life or death sentence.

In sharp contrast to the instructions in Ramos, the comments here, as noted in the dissenting opinion of Judge Lee, had the effect of "lessening a juror's sense of responsibility for the fate of the accused":

Those jurors who are not convinced that a defendant's life should be taken, may not argue so strongly or hold their position when they are led to believe that a reviewing court will correct a mistake in their judgment. Dissenting opinion at 2, annexed as Exhibit "A".

The prosecutor here advised the members of the jury that they were not the ones responsible for the defendant's

death, when in fact they were:

Now, they [defense counsel] would have you believe that you're going to kill this man and they know -- they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it.

When defense counsel timely objected, the prosecutor retorted:

Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.

Instead of curing this flagrant error by proper cautionary instructions, the trial court condoned the prosecutor's comments:

All right, go on and make the full expression so the jury will not be confused. I think it is proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the jury so they will not be confused.

The prosecutor then made his "full expression" that the jury's determination was not "the final decision" and was subject to automatic review by the State's highest court:

[Defense counsel]: insinuat[ed] that your decision is the final decision and that they're gonna take Bobby Caldwell out in the front of the Courthouse in moments and string him up and that is terribly unfair. For they know, as I know, and as Judge Baker has told you, that that decision you render is automatically reviewable by the Supreme Court. Automatically, and I think it's unfair and I don't mind telling them so (681).

The issue here is far different from attempting to predict individual future behavior, as in Ramos. This Court held that there was no diminishment of the jury's responsibility for its verdict in Ramos, but rather, a fostering of such responsibility by providing the jury with the information needed to mete out the appropriate sentence.

Here, just the converse is true. Advising a jury that a death sentence is non-final and subject to appellate review is deceptive* and detracts from the jury's overall responsibility for its decision. These comments divert the jury from "undertaking the kind of indi-

* By statute, the Mississippi Supreme Court's review of the jury's determination of death is limited to:

(a) whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

(b) whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance...and

(c) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Mississippi Code 1972 Ann. § 99-19-105 (1983 Supp.)

As Judge Lee noted in his dissenting opinion:

Even a novice attorney knows that appellate courts do not impose a death penalty, they merely review the jury's decision and that review is with a presumption of correctness. Dissenting opinion at 3, annexed hereto as "A".

vidualized sentencing determination that under Woodson v. North Carolina, 428 U.S. at 304, is a 'constitutionally indispensable part of the process of inflicting the penalty of death', California v. Ramos, supra, U.S. at , 103 S.Ct. at .

This Court, in Ramos, acknowledged the problems caused by remarks to a jury that conveyed the impression to the jury that its determination was not "final":

In fact, advising jurors that a death verdict is theoretically modifiable, and thus not "final" may incline them to approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencers.

California v. Ramos,
supra, U.S. at 103 S.Ct. at
(O'Connor, J.) (1983)

Individualized sentencing by the jury in capital cases is essential to the constitutionality of a statutory

scheme. Gregg v. Georgia, 428 U.S. 153, 206 (1976); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Zant v. Stephens, U.S. , 51 U.S.L.W. 4891 (1983); Proffitt v. Florida, 428 U.S. 242, 251-252 (1976); Woodson v. North Carolina, 428 U.S. 280, 304-306 (1976); Roberts v. Louisiana, 431 U.S. 633 (1977). Advising the jury that the sentence is non-final and subject to appellate review unconstitutionally detracts from the jury's responsibility to impose such a sentence.

The State below noted in its brief in the Mississippi Supreme Court that this "issue is far too vital to be left to purely procedural handling" and that the issue is one "of common appearance in recent capital cases" in the State of Mississippi. Appellee's Supplemental Brief at 1. Defense counsel made timely objection. The mere fact that it was not

included in the assignments of error, should not preclude the Court from addressing such a critical issue in a death case. Moreover, the issue was briefed by both parties below prior to the decision by the Supreme Court of Mississippi. Accordingly, it is properly preserved for review. Because this issue frequently arises in capital cases it should be reviewed by this Court.

The majority's statement below that defense summation invited the prosecutorial response is without merit. Defense counsel argued the only two sentencing alternatives available to his client under the Mississippi statutory scheme*. As the dissent stated

* Mississippi Code § 99-19-101 in relevant part provides:

(1) Upon conviction or adjudication of guilt of a defendant of capital murder the court shall conduct a separate sentencing

below "[t]he fact that appellate review is mandated is irrelevant to the thought processes required to find that an accused should be denied mercy and sentenced to die". Dissenting opinion at 4, annexed hereto as Exhibit "A". Defense counsel's plea for petitioner's life did not invite the comment in question.

proceeding to determine whether the defendant should be sentenced to death or life imprisonment.

No. 83-6607

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

Bobby Caldwell,
Petitioner,
v.
The State of Mississippi,
Respondent.

REPLY BRIEF

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POINT I

THE PROSECUTOR'S REMARKS CONCERNING THE NON-FINALITY OF THE JURY'S VERDICT AND APPELLATE REVIEW CONSTITUTE CONSTITUTIONAL ERROR AND REQUIRE A NEW TRIAL. [In Reply To Point A Of Respondent's Brief]

1. No Adequate Independent State Ground.

Respondent argues at 18-23 of its brief that the Court is without jurisdiction to consider Point I of petitioner's brief because it rests on an adequate and independent state ground, i.e., the failure by petitioner's assigned appellate counsel below to assign this claim as error in the Mississippi Supreme Court pursuant to Rule 6(B).¹

¹ The Mississippi Supreme Court has described its Rule 6(B) as a "general rule" that "no error not assigned may be urged as grounds for reversal." *Read v. State*, 430 So.2d 832, 838 (1983). It reads as follows:

No error not distinctly assigned shall be argued by counsel, except upon request of the Court, but the Court may, at its option, notice a plain error not assigned or distinctly specified.

Respondent's contention is devoid of merit.

Although outside of the record, respondent maintains that the issue of the "non-final" and "reviewable" comments was raised "by one of the Justices of the State Supreme Court sua sponte during oral arguments." Respondent's brief at 18. Petitioner's counsel has been informed by Cleveland McDowell, Esq., petitioner's assigned appellate counsel in the Mississippi Supreme Court, that he [McDowell] received a phone call from the administrative clerk of the Mississippi Supreme Court prior to oral argument,

The Mississippi Supreme Court has further noted with respect to this provision:

This rule gives this Court the option to raise 'plain error' not assigned when it deems proper and is not for the purpose of allowing counsel to argue questions not raised by the assignment of error. Prueitt v. State, 261 So.2d 119, 125 (Miss. 1972).

advising him that the court would like him to address that issue at oral argument, even though it had not been briefed or assigned as error. Mr. McDowell advises that both sides did so at oral argument and supplemented this by filing post-argument briefs addressed to the issue. The post-argument briefs are part of the record below. It is clear under both versions that the Mississippi Supreme Court sua sponte requested the parties to address the issue, and that this was done at the oral argument and supplemented by written briefs which the Court considered prior to rendering its decision. It was also addressed by both parties in the petitioner's application for rehearing.

Whether the decision below rests on an adequate independent state ground is itself a federal question:

A procedural default which is held to bar challenge to a conviction in state courts, even on federal constitutional grounds, prevents implementation of the federal right. Accordingly, we have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question. *Henry v. Mississippi*, 379 U.S. 443, 447 (1965) (Brennan, J.)

In *James v. Kentucky*, U.S. ___, 104 S.Ct. 1830 (1984), the court held that defense counsel's request for an "admonition" that no adverse inference be drawn from the defendant's failure to testify when, according to state law, he should have requested an "instruction," was not an adequate basis under state law to deny the accused his constitutional right to such a charge. In that case, as here, the alleged "fatal procedural default" is "not the sort of firmly established and regularly followed state practice that can prevent imple-

mentation of federal constitutional rights" Id. at 1835.

Respondent cites the Court to no case where an issue briefed and argued in the Mississippi Supreme Court was denied recognition because it was not assigned as error pursuant to Rule 6(B). Moreover, in a case decided subsequent to petitioner's, the Court reversed on the merits for the very reason stated by the dissent herein, even though defense counsel had failed to make any objection at trial. Williams v. State, 445 So.2d 798 (Miss. 1984).

The rule exists for the benefit of the Mississippi Supreme Court which promulgated it. That court in this case waived the rule when it sua sponte raised the issue and requested the parties to address it on the merits. Both parties were afforded ample opportunity to address the merits of the issue and did

so. The court addressed the merits of the issue and it was the sole basis for the 4-4 split. Neither the court below nor respondent can claim that it was prejudiced by appellate counsel's omission. It serves "no perceivable state interest" to permit the State to invoke this rule to preclude review for lack of jurisdiction. As in James v. Kentucky, supra, this is not a case of a "defendant attempting to circumvent" a state procedural rule. Nor does the respondent claim that such is the case.

In Henry v. Mississippi, supra, the court noted that matters of trial strategy and tactics by defense counsel, even though without consultation with the accused, would bar direct federal review (sic) of claims thereby foregone. Henry v. Mississippi, supra, 379 U.S. at 451, 85 S.Ct. at 569. See also, Wainwright v. Sykes, 433 U.S. 89, 97 S.Ct. 2497

(1977). Clearly strategy and tactics are not involved here. Accordingly, the failure of petitioner's assigned appellate counsel below should not be imputed to the petitioner.

The Court recently addressed a similar issue in Evitts v. Lucey, U.S. ___, 53 U.S.L.W. 4101 (decided January 21, 1985). The Court there held that an accused has the Sixth Amendment right to the effective assistance of counsel in a non-discretionary state appeal. The failure to file a "statement of appeal" as a preliminary step in the state appellate process there could not bar consideration of the appeal on the merits. That situation is similar to the default on which respondent seeks to rely. Petitioner's appellate counsel failed to claim this issue as error in his assignment of errors filed at the outset of the appellate process. By this

omission counsel violated petitioner's right to effective assistance of counsel. As in Evitts, this procedural default may not bar consideration of the merits of the issue.

Petitioner has been sentenced to death, which "requires a correspondingly greater degree of scrutiny" of the record, California v. Ramos, U.S. ___, 103 S.Ct. 3446, 3451 n. 9, and notice of error not properly raised below. Edding v. Oklahoma, 455 U.S. 104, 113-114 n. 9 (1981). Accordingly, the Court should address the merits of the federal constitutional claim.

2. Petitioner Should Prevail On The Merits.²

Respondent does not seek to sustain

² Respondent at 15 acknowledges that the decision below on the merits rests on a "substantive constitutional" ground.

the judgment below for the reasons stated by the Mississippi Supreme Court, i.e., that defense counsel invited error by reference to (1) imprisonment for the rest of petitioner's life [discussed in Petitioner's brief at 31] and (2) pleading for forgiveness³ [discussed at Petitioner's brief at 32]. Abandoning those grounds, the State argues that defense counsel's summation attempted "to advise the jury that the defendant would upon the return of their verdict literally be taken out the back door of the Courthouse and there executed." Respondent's brief at 29-30. Ironically, the respondent bolsters this argument

³ The Court has recognized that in a death case it is constitutionally permissible for a jury "to dispense mercy on the basis of factors too intangible to write into a statute." *Gregg v. Georgia*, 428 U.S. 153, 222, 96 S.Ct. 2909, 2947 (1976) (White, J., concurring in judgment). See also, *Lockett v. Ohio*, 438 U.S. 586 (1978).

with the contradictory contention that "virtually every person of age eligible for jury service knows that death penalties are reviewable on appeal." Respondent's brief at 31. Both claims are without merit.

The record does not support respondent's first contention. This basis for invited error was never mentioned in the opinion of the four judges below who sustained the sentence, nor by the four judges who dissented. Respondent does not cite the Court to any particular part of the defense counsel's summation (J.A. 16-21) to substantiate this contention. It appears that this claim was merely a straw man set up by the prosecutor,⁴ Mr. Williams, to enable

⁴ The prosecutor stated at the outset of argument:

I'm in complete disagreement with the approach the defense has taken. I

him to get in the challenged remarks.

Mr. Williams, the prosecutor below, used the same tactics in Wiley v. State, 449 So.2d 756 (Miss. 1984)--decided after petitioner's case. Mr. Williams' argument in Wiley has a familiar ring:

He [defense counsel] tells you . . . that the State wants to kill a man and that you'll have to live with this the rest of your life. He's attempting to put you in the role of hangman. It's unfair. It's totally unfair. He knows just as well, like I know and every other person that's familiar with the Court system, that any decision you render is automatically reviewable. Wiley v. State, supra, 449 So.2d at 761.

don't think it's fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know--they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet they . . . (J.a. 21).

The Mississippi Supreme Court reversed Wiley's sentence, stating:

The role of juror in a capital murder trial brings with it an awesome responsibility. Fortunately, few of us are ever required to make the decision whether to end another human being's life; however, that is precisely the question confronting jurors following a guilty verdict in a capital case. Such decision is so ominous that it becomes almost trite to attempt to assess the introspection, concern, and solemnity that accompany it.

Because of the importance of the jurors' deliberations we must be cautious in avoiding any actions which tend to reduce the jurors' sense of responsibility for their decision. They must not be permitted to look down the road for someone to pass the buck to. Arguments by a prosecutor which relate to reviewability of a jury's verdict have exactly this dangerous effect. Jurors faced with the portentous duty of deciding an accused's fate will take comfort in the fact of review. They may view their role as merely advisory, a view that can prove fatal to an accused.

Under our law the jury is the sole player in the judicial process who may vote to send an accused to die. They alone make

that determination and all review is then conducted with a presumption of its correctness. While a jury is not literally 'the hangman,' only they may supply the hangman's victims. All notions of justice require that the jurors as individuals, and as a body, recognize and appreciate the gravity of their role. Id. at 762.

Respondent's reliance on Donnelly v. DeChristoforo, 416 U.S. 637 (1974), is misplaced. There the trial court gave the jury immediate admonishment to disregard the prosecutor's improper comments on summation. Moreover, in his final charge to the jury the court specifically addressed the prosecutor's improper comments and again cautioned that the remark was unsupported and must be ignored in their deliberations. By contrast, here the court never gave a curative instruction. What is worse, upon timely defense objection, the trial judge here condoned the error and encouraged the prosecution to further

pursue the improper line of argument, which the prosecutor then did ["insinuating that your decision is the final decision" (J.A. 22)].

The respondent states that Corn v. Zant, 708 F.2d 549 (11th Cir. 1983) and Moore v. Zant, 722 F.2d 640 (11th Cir. 1983) "appear to be dispositive of the issue." Respondent's brief at 30-31. If indeed these cases are "dispositive," it is in favor of the petitioner, not the respondent. In Corn v. Zant, supra, there was no defense objection and the issue arose when the Court understandably misinterpreted a question from the jury during deliberations. The jury asked, "[i]f the death penalty is invoked, does that automatically mean that the defendant will be placed in the electric chair?" Id. at 556. The Court answered that the law provides for a mandatory appeal in a death sentence case. Ibid.

The jury then immediately asked what it had really intended, i.e., whether the judge could change the sentence, and the court instructed the jury that he could not. The jury there was left with the distinct belief that they were the final and sole determiners of the sentence. The prosecutor never argued reviewability to diminish the jurors' responsibility for imposition of the sentence.

The Court in Corn concluded that the remarks could "not be construed as encouraging the jury to attach diminished consequences to the verdict." Id. at 556. While indicating that the particular circumstances involved no constitutional deprivation, the Court of Appeals cautioned that "a reference to automatic appeal of the death penalty in a different context might have resulted in fundamental unfairness." Id. at 557. The Court of Appeals referred to Prevatte

v. State, 233 Ga. 929, 214 S.E.2d 365, 367 (1975), where the Georgia Supreme Court held that the "inevitable effect" of the prosecutor's emphasis in summation on defendant's right of automatic appeal is "to encourage the jury to attach diminished consequences to their verdict." Such is the case here.

Respondent's reliance on Moore v. Zant, 722 F.2d 640 (11th Cir. 1983) is also puzzling. The court there specifically admonished the jury in his charge to disregard the prosecutor's reference to automatic sentence review. *Id.* at 648. The Court held that the improper comments under such circumstances did not render the trial fundamentally unfair. Here the trial judge condoned the remarks.

Contrary to respondent's claim at 33 of his brief, the Court did not dispose of this issue in Maggio v. Williams, U.S.

_____, 104 S.Ct. 311 (1983). Maggio involved a decision on a motion to vacate a stay of execution issued by the Court of Appeals. The Court noted that it had denied certiorari twice in the very same case, and accordingly held that the applicable standard⁵ for issuance of a stay had not been met. It is too obvious to require citation that denial of certiorari is not precedent with respect to the merits⁶ of the issues raised.

⁵ A "reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the granting of certiorari" Id. at 311.

⁶ Three Justices of the Court, however, by separate opinion, indicated concern that a prosecutor's argument concerning mandatory review of the death sentence was misleading and tended to diminish overall responsibility for imposition of the sentence. See concurring opinion of Justice Stephens and dissenting opinion of Justice Brennan, joined in by Justice Marshall. Maggio v. Williams, supra, _____ U.S. at _____, 104 S.Ct. at 315, 316 et. seq.

It is important to note that the case here is not one which simply refers to the fact of appellate review. The reference was made by the prosecutor, together with the misleading statement that the jury's determination "is not the final decision." Clearly, the intent and effect of this argument was to lessen the juror's responsibility for a decision which rested exclusively on them under Mississippi law. Respondent's reference to State v. Berry, 391 So.2d 406 (La. 1980) is well taken:

Any prosecutor who refers to appellate review of the death sentence treads dangerously in the area of reversible error. If the reference conveys the message that the juror's awesome responsibility is lessened by the fact that their decision is not the final one, or if the reference contains inaccurate or misleading information, then the defendant has not had a fair trial in the sentence phase, and the penalty should be vacated. Id. at 418.

The law in Mississippi, pursuant to Williams v. State, 445 So.2d 798 (Miss. 1984) and Wiley v. State, supra -- decided after petitioner's case -- is that reference to right of review is prejudicial error requiring a new capital sentencing trial, even in the absence of a contemporaneous objection by defense counsel at trial. It is solely by virtue of the recusal of a single justice in petitioner's case that the same result was not reached below.

It cannot be said that this error of constitutional dimension did not affect the jury's deliberations. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967). The judgment below should be vacated and remanded for a new trial.



EDITOR'S NOTE

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No. 87-121

Supreme Court, U.S.
FILED

AUG 19 1987

JOSEPH F. SPANGLER, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections, and
ROBERT A. BUTTERWORTH, Attorney General,
State of Florida

Petitioners,

v.

AUBREY DENNIS ADAMS, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

OPPOSITION TO THE GRANTING OF THE
PETITION FOR WRIT OF CERTIORARI

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August 19, 1987

1

Counterstatement of Questions Presented

1. Whether certiorari should be granted on the basis of purported conflicts on a federal question, where one supposed conflict concerns a state court which did not decide any federal question and the other asserted conflict concerns dictum or an alternative holding in a wholly different context?

2. Whether certiorari should be granted on the basis of the assertion that the Eleventh Circuit failed to follow this Court's precedents, where the Eleventh Circuit specifically did consider and follow those precedents?

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No. 87-121

IN THE SUPREME COURT OF THE UNITED STATES
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RICHARD L. DUGGER, Secretary, Florida
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AUBREY DENNIS ADAMS, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

OPPOSITION TO THE GRANTING OF THE
PETITION FOR WRIT OF CERTIORARI

REASONS FOR DENYING
THE WRIT

I.

THERE IS NO CONFLICT ON A FEDERAL QUESTION
WITH ANY HOLDING OF THE FLORIDA SUPREME
COURT OR THE FIFTH CIRCUIT

Petitioners' principal contention in their
certiorari petition is that there is a conflict on a

federal question between (a) the Eleventh Circuit's holding that it could reach the merits of Mr. Adams' Caldwell claim and (b) holdings of the Florida Supreme Court and the Fifth Circuit. (Petition 12-21.)¹ However, there is no such conflict.

A. The Florida Supreme Court Has Not Rendered Any Decision On the Federal Questions Which Petitioners Seek To Raise Here

The Florida Supreme Court decisions which Petitioners cite (Petition at 13), Aldridge v. State, 503 So.2d 1257, 1259 (Fla. 1987), and Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987), do not make any holding on the federal questions on which Petitioners are seeking certiorari. Those questions are whether the federal courts are precluded from considering Mr. Adams' Caldwell claim by the "cause and prejudice" test initially set forth in Wainwright v. Sykes, 433 U.S. 72 (1977), or because Mr. Adams has allegedly abused the writ of federal habeas corpus.

The Florida Supreme Court merely held that, for state law procedural reasons, it would not decide two

¹ References to "Petition ____ - ____" are to pages in Petitioners' Petition For A Writ Of Certiorari in the instant case.

particular Caldwell claims. It did not make, and could not have made, any holding on whether a federal habeas corpus court would later be precluded under federal law from reaching the merits of Caldwell claims. Since the Florida Supreme Court has made no holding regarding either the Wainwright v. Sykes issue or the abuse of the writ issue, its decisions provide no basis for granting the writ of certiorari on those issues here.

B. The Fifth Circuit's Dictum Or Alternative Holding In A Very Different Context Provides No Basis For Granting Certiorari

The holding in the Fifth Circuit case cited by Petitioners (see Petition 17-21), Moore v. Blackburn, 774 F.2d 97, 98 (5th Cir. 1985), cert. denied, 105 S.Ct. 2904 (1986), is also not in conflict with the Eleventh Circuit's holding that it could reach the merits of Mr. Adams' Caldwell claim. In Moore, the Fifth Circuit held that Rule 9(b) of the Rules Governing Section 2254 Cases and the principles set forth in Sanders v. United States, 373 U.S. 1 (1963), barred Mr. Moore from raising successively the same constitutional attack on the prosecutor's closing argument that he had unsuccessfully litigated prior to this Court's decision in Caldwell. That holding does not conflict with the Eleventh Circuit's decision in

the instant case, which concerns a successor, not successive, petition.

The Fifth Circuit's one-page decision in Moore went on to discuss, in what is either pure dictum or at most an alternative holding, what it would have done if it had decided that the prosecutorial argument issue were being raised for the first time. The Fifth Circuit stated that in that hypothetical event, it would have considered the raising of that claim to have been an abuse of the writ. Id.

Even if such dictum or alternative holding were in opposition to the Eleventh Circuit's holding in Mr. Adams' case, it would not create a clear conflict under Supreme Court Rule 17.1(a). See Estreicher & Sexton, Managerial Theory Of The Supreme Court, 59 N.Y.U. L. Rev. 681, 722-23 (1984). Dictum or an alternative holding may not result from "the same thorough deliberation" as an actual holding. Id. Moreover,

"The federal courts of appeals and state supreme courts should be permitted -- indeed, encouraged, to consider dicta or alternative holdings in light of emerging conflicting signals from other courts. This not only relieves the Supreme Court of the burden of unnecessarily resolving conflicts that may be resolved below, but it also emphasizes the responsibility of the lower courts to reconcile differences where possible, preserving their contrary positions only in cases truly calling for Supreme Court intervention. * * *

Id. (footnotes omitted).

In any event, it is far from certain that the dictum or alternative holding in Moore is opposed to the Eleventh Circuit's holding in Mr. Adams' case. Whereas prosecutorial closing arguments such as that in Moore had been challenged under the Eighth Amendment prior to this Court's decision in Caldwell, no one had ever raised an Eighth Amendment challenge prior to Caldwell to jury instructions concerning the jury's role under Florida's new capital sentencing system, in which judicial overrides of juries are sometimes possible. See Adams v. Wainwright, 816 F.2d 1493, 1499-1500 (11th Cir. 1987). Hence, it is by no means clear that the Fifth Circuit would disagree with the Eleventh Circuit's decision to reach the merits in Mr. Adams' case.

Petitioners' claim that there is a conflict between the Fifth and Tenth Circuits is also incorrect. The Tenth Circuit case which Petitioners cite, Dutton v. Brown, 812 F.2d 593, 596 (10th Cir. 1987) (en banc), concerned the Wainwright v. Sykes "cause and prejudice" test for procedural default. It did not present any issue regarding either a successive or successor petition, and thus is not in conflict with the Fifth Cir-

cuit's actual holding, dictum or alternative holding in Moore.

II.

THE ELEVENTH CIRCUIT EXPLICITLY FOLLOWED
THIS COURT'S PRECEDENTS IN CONSIDERING
BOTH CAUSE AND PREJUDICE

Petitioners make a series of unsupported assertions that the Eleventh Circuit failed to follow this Court's holdings concerning "cause" and "prejudice." (See Petition 20-27.) These assertions are not only patently incorrect. They also proceed from the erroneous premise that the threshold for applying the "cause and prejudice" test was satisfied here.

The Eleventh Circuit held that the Florida Supreme Court's decision either was based on an erroneous view of the merits of Mr. Adams' constitutional claim or constituted "application of a procedural bar with regard to a type of claim that Florida does not regularly and consistently bar." Adams, supra, 816 F.2d at 1497. Accord, Wheat v. Thigpen, 793 F.2d 621, 625-27 (5th Cir. 1986), cert. denied, 107 S.Ct. 1566 (1987). Thus, the Eleventh Circuit decided to reach the merits on independent grounds before applying the "cause and prejudice" test. Accordingly, even if the Eleventh Circuit's appli-

cation of the "cause and prejudice" test were as erroneous as Petitioners maintain, there would be no basis for granting the petition here.

In any event, Chief Judge Roney and Judges Fay and Johnson did not cavalierly ignore this Court's precedents when they considered "cause" and "prejudice". Their conclusion that there was "cause" for Mr. Adams' not having presented an Eighth Amendment attack on the jury instructions prior to Caldwell is fully in accord with this Court's holdings in Reed v. Ross, 468 U.S. 1, 16 (1986), and Smith v. Murray, 106 S.Ct. 2661, 2667-68 (1986). Indeed, both of those holdings are discussed in the Eleventh Circuit's decision.

Moreover, there is simply no basis for Petitioners' suggestion that the Eleventh Circuit utilized a "deliberate bypass" standard or premised its "cause" ruling upon failings of Mr. Adams' counsel. Instead, the Eleventh Circuit engaged in a careful analysis, in the course of which it pointed out that the "state has not cited to, nor have we found, any decisions indicating that this type of Eighth Amendment claim was being raised" prior to Caldwell in cases involving a possible judicial override of the jury. Adams, supra, 816 F.2d at 1497-1500. Unlike Smith v. Murray, supra, where various

forms of a claim were "percolating" in the lower courts and an amicus had raised that claim in that very case, "the fact no one was raising the claim Adams now raises at the time of his trial and appeal certainly is an indication that the claim was so novel as to have no reasonable basis in existing precedent." Adams, supra, 816 F.2d at 1500.

Finally, the Eleventh Circuit, far from assuming prejudice, as Petitioners assert, specifically addressed the "prejudice" issue in a lengthy footnote as well as in the text. See Adams, supra, at 1501 & n.9. In this analysis, the Eleventh Circuit considered the trial judge's numerous egregiously misleading statements about the jury's role in the context of the judge's other instructions and the trial as a whole. It concluded that the judge "left the jury with a false impression as to the significance of its role in the sentencing process." Id.

Thus, Petitioners' ad hominem attacks on the distinguished Eleventh Circuit panel which decided this case are meritless. Despite Petitioners' strenuous efforts to secure en banc review of the unanimous holding rendered by Chief Judge Roney and Judges Fay and Johnson, not a single member of the Eleventh Circuit suggested

such review. Petitioners' extreme unhappiness with the Eleventh Circuit's decision provides no more basis for granting review by certiorari here than it did for granting en banc review.

CONCLUSION

For the reasons set forth above, the petition for the granting of a writ of certiorari should be denied.

Dated: August 19, 1987

Respectfully submitted,

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AFFIDAVIT OF MAILING

I, RONALD J. TABAK, counsel of record for Aubrey Dennis Adams, Jr., Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of August 1987, within the time permitted for filing, I caused to be deposited in the United States mail, with first-class postage prepaid, one original and nine copies of the foregoing Opposition To The Granting Of The Petition For Writ of Certiorari, addressed to the Clerk of the Supreme Court of the United States.

Ronald J. Tabak
Ronald J. Tabak

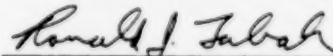
Subscribed and Sworn to
before me, a Notary Public
at New York, New York this
19th day of August 1987.

William B. Korman

Notary Public
WILLIAM B. KORMAN
Notary Public, State of New York
No. 31-476783C
Qualified in New York County
Commission Expires Aug. 31, 1992

CERTIFICATE OF SERVICE

I, RONALD J. TABAK, counsel of record for Aubrey Dennis Adams, Jr., Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this 19th day of August 1987 served upon the Petitioners a true and correct copy of the foregoing Opposition To The Granting Of The Petition For Writ of Certiorari, by causing a copy of the same to be deposited in the United States mail with proper address and with adequate postage prepaid to: Margene A. Roper, Esq., Assistant Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014.



Ronald J. Tabak
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87-121

3

Supreme Court, U.S.

FILED

APR 21 1988

JOSEPH F. SPANICK, JR.
CLERK

**IN THE SUPREME COURT
OF THE UNITED STATES**

OCTOBER TERM, 1987

RICHARD L. DUGGER, *et al.*,

Petitioners,

VS.

AUBREY DENNIS ADAMS, JR.,

Respondent.

**On Writ of Certiorari to the United States Court of
Appeals for the Eleventh Circuit**

=====

**MOTION OF AMICUS CURIAE FOR LEAVE TO FILE
BRIEF IN SUPPORT OF PETITIONER**

=====

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3 PP



**IN THE SUPREME COURT
OF THE UNITED STATES**

OCTOBER TERM, 1987

RICHARD L. DUGGER, *et al.*,

Petitioners,

vs.

AUBREY DENNIS ADAMS, JR.,

Respondent.

**On Writ of Certiorari to the United States Court of
Appeals for the Eleventh Circuit**

**MOTION OF AMICUS CURIAE FOR LEAVE TO
FILE BRIEF IN SUPPORT OF PETITIONER**

Pursuant to Supreme Court Rule 36.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief amicus curiae in support of petitioners in the above captioned case. Counsel for petitioner has consented in writing. Counsel for respondent has consented by telephone, but amicus has not received his written consent as of the last day to file the motion and brief.

In the accompanying brief, amicus argues that this court should adopt the view of retroactivity advocated by Justice Harlan in *Mackey v. United States*, 401 U.S. 667, 675-702 (1971) (concurring and dissenting).

Amicus will demonstrate that petitioner should not be allowed to raise a *Caldwell* claim on habeas corpus. A *Caldwell* claim cannot qualify as "novel" under *Reed v. Ross* 468 U.S. 1 (1984) and at the same time be applied retroactively on habeas under the Harlan view.

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The present case involves the extended relitigation of the legality of a trial conducted many years ago in compliance with the then-existing standards. Such unnecessary relitigation is contrary to the rights of victims and society which CJLF was formed to advance.

For the foregoing reasons amicus requests leave to file its brief.

Dated: April 21, 1988

Respectfully submitted,

KENT S. SCHEIDEGGER

*Attorney for Amicus Curiae
Criminal Justice Legal Foundation*

5

Supreme Court, U.S.
FILED
MAY 13 1988
JOSEPH F. SPANIOLO, JR.
CLERK

NO. 87-121
IN THE
Supreme Court of the United States

October Term, 1987

RICHARD L. DUGGER, et al., Petitioners,

v.

AUBREY DENNIS ADAMS, Jr., Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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Petition For Certiorari Filed July 20, 1987
Certiorari Granted March 7, 1988

99P



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NOTATION

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion of the United States District Court for the Middle District of Florida, Ocala Division, dated March 7, 1986.....A 43

Opinion of the United States Court of Appeals for the Eleventh Circuit, dated November 13, 1986.....A 1

Opinion of the United States Court of Appeals for the Eleventh Circuit, On Petition for Rehearing, dated April 23, 1987.....A 78

**CHRONOLOGICAL LIST OF RELEVANT
DOCKET ENTRIES**

Mar. 5, 1986-Petition for Writ of Habeas Corpus, by petitioner.

Mar. 5, 1986-Response to Application for Stay of Execution and Response to Anticipated Petition for Writ of Habeas Corpus, by respondents.

Mar. 6, 1986-Motion for Stay of Execution, by petitioner.

Mar. 6, 1986-Order from the U.S. Supreme Court vacating the order of February 26, 1986. The application for stay of execution of the sentence of death presented to Justice Powell is GRANTED until March 26, 1986 or until the disposition by this Court of the petition for writ of certiorari, whichever is earlier, unless otherwise extended by the Court.

Mar. 6, 1986-Record of Hearing: oral argument on Petition for Writ of Habeas Corpus and Application for Stay of Execution before Hon. John H. Moore II. Taken under advisement by the Court.

Mar. 7, 1986-Order and opinion denying the Petition for Writ of Habeas Corpus.

Mar. 7, 1986-Judgment: pursuant to the Order and Opinion filed 3/7/86.

Nov. 13, 1986-Opinion of the Court of Appeals reversing the district court's denial of a writ of habeas corpus and ordering a new sentencing proceeding.

April 23, 1987-Revised opinion of the Court of Appeals as to Part I(A)(2),

entitled "Procedural Bar."

CIRCUIT COURT FOR LAKE
COUNTY, FLORIDA.

STATE OF FLORIDA,

Plaintiff,

vs. CRIMINAL NO. 78-574-CF-A-01

AUBREY DENNIS ADAMS, JR.,

Defendant.

JURY TRIAL OF AUBREY DENNIS ADAMS, JR.

Filed April 25, 1979

THIS CAUSE came on for Jury Trial before the Honorable William F. Edwards, Circuit Judge, Fifth Judicial Circuit of Florida, at Tavares, Lake County, Florida, on October 12, 1978, at which time the following proceedings were had:

Appearances:

Mr. Gordon G. Oldham, Jr., State Attorney, Mr. Jeff Pfister and Mr. S. Ray Gill, Assistant State Attorneys, Fifth Judicial Circuit of Florida, Leesburg, Florida, For the Plaintiff

Mr. Reginald Black and Mr. Frederick E. Landt, III, Black, Landt & Appleget, Post Office Box 1921, Ocala, Florida 32670, For the Defendant.

Proceedings

* * *

LISTINGS OF JURORS

[6-7]

All right; as your name is called, please take a seat in the Jury Box as directed by the Bailiff. Number 130.

THE CLERK: **Rebecca B. Wright.**

THE COURT: Number 121.

THE CLERK: **Percy A. Walker.**

THE COURT: Number 50.

THE CLERK: **Jacquelyn Hester.**

THE COURT: Number 73.

THE CLERK: **Emily Meinhold.**

THE COURT: Number 116.

THE CLERK: **Dolores L. Taylor.**

THE COURT: Number 6.

THE CLERK: **Leslie J. Anderson.**

THE COURT: Number 115.

THE CLERK: **Joann B. Swiderski.**

THE COURT: Number 42.

THE CLERK: **Helen Fryba.**

THE COURT: Number 63.

THE CLERK: **Arthur Langlitz.**

THE COURT: Number 111.

THE CLERK: **Robert Charles Stout, Sr.**

THE COURT: Number 51.

THE CLERK: **Reed Hollinger.**

THE COURT: Number 65.

THE CLERK: **George A. Long, Jr.**

THE COURT: Number 54. —

THE CLERK: **George Frederick Holl.**

THE COURT: Number 61.

THE CLERK: **Orville A. Kidder.**

* * *

[122-123]

THE COURT: Number 47.

BY THE CLERK: **Alma L. Hart.**

THE COURT: Number 14.

BY THE CLERK: **Harrison D.**

Broomfield, Jr.

THE COURT: Number 1.

BY THE CLERK: **James W. Adams.**

THE COURT: Number 7.

BY THE CLERK: **Phoebe Baker.**

THE COURT: Number 24.

BY THE CLERK: **Edith Clark.**

* * *

[149-150]

MR. LANDT: I'd like to inquire of each of you that so we will make the rounds.

MR. Bloomfield, do you know anyone on this panel well?

BY THE JUROR: No, I don't know any of them.

MR. LANDT: Thank you. Mrs. Hart, do you know any of the panel members?

BY THE JUROR: No.

MR. LANDT: How about you, Mr. Walker?

BY THE JUROR: No.

MR. LANDT: Mrs. Wright?

BY THE JUROR: No, sir.

MR. LANDT: Mr. Anderson?

BY THE JUROR: No, sir.

MR. LANDT: **Mrs. Swiderski?**

BY THE JUROR: No.

MR. LANDT: **Mrs. Baker?**

BY THE JUROR: No.

MR. LANDT: **Ms. Clark?**

BY THE JUROR: No.

MR. LANDT: **Mr. Stout?**

BY THE JUROR: No.

MR. LANDT: **Mr. Kidder?**

BY THE JUROR: No.

MR. LANDT: **Mr. Holl?**

BY THE JUROR: No.

MR. LANDT: **Mr. Long?**

BY THE JUROR: No.

MR. LANDT: **Mr. Hollinger**, do you
know any of the jury panel members?

BY THE JUROR: No.

MR. LANDT: Thank you. **Mr. Adams**,...

* * *

[221-222]

THE COURT: Number 49.

BY THE CLERK: **Clarence Henson**.

THE COURT: Number 94.

BY THE CLERK: **Lawrence Reilly.**

THE COURT: Number 59.

BY THE CLERK: **Elizabeth Juselius.**

* * *

[240]

THE COURT: All right; we'll stop at this point and go ahead and pull two others. You may let her out.

(Thereupon the prospective Juror **Mrs. Wilma Ferguson** left the Courtroom).

THE COURT: Number 90.

BY THE CLERK: **William A. Read.**

THE COURT: Number 89.

BY THE CLERK: **Hubert Jackson Rayburn.**

* * *

[286]

THE COURT: **Mr. Read**, you may step down and you're excused from your subpoena and you will not have to come back to Court unless subpoenaed later on. Thank

you very much for coming.

MR. OLDHAM: May we approach the bench, Your Honor?

THE COURT: Come forward.

(Thereupon Counsel for the respective parties to the cause approached the bench and conferred with the Court briefly, out of the hearing of the Court Reporter and the prospective Jurors).

THE COURT: Number 64.

BY THE CLERK: **Linda Carol Locke.**

THE COURT: Number 13.

BY THE CLERK: **Raymond Wayne Bronson.**

THE COURT: Number 15.

BY THE CLERK: **Albert L. Brown.**

* * *

[323-325]

(Thereupon the following proceedings were held within the hearing of the prospective Jurors):

THE COURT: Now, ladies and gentlemen of the prospective Jury, we've been into

this now for -- all day yesterday and almost half of today. Some of you have not been questioned for the last -- say the last seven or eight hours that you've had to sit here and before we get down to the point of considering accepting this Jury, I want to ask a general question as to each one of you individually and I would like to just run down the line and have you answer the question to me, and I will start with **Mr. Broomfield** -- but it'll be the same question to all of you.

Has anything happened today or yesterday after the attorneys have questioned you or after the Court has talked to you that now makes you prejudiced either for or against the Defendant based on something that has happened after the Court or the attorneys have questioned you, such as some comment that some other prospective Juror may have said or perhaps something that the Court

said later on after you had been questioned that has now made you in your conscience and under your oath that you feel that you cannot sit as a fair and impartial Juror, and I ask you, Mr. Broomfield, if anything along this line happened or do you feel right now that you can sit as a fair and impartial Juror in reference to this case?

BY THE JUROR: Yes, I do, Your Honor.

THE COURT: All right; **Mrs. Hart?**

BY THE JUROR: Yes, sir.

THE COURT: **Mr. Henson?**

BY THE JUROR: Yes, sir.

THE COURT: **Mrs. Wright?**

BY THE JUROR: Yes, sir.

THE COURT: **Mr. Anderson?**

BY THE JUROR: Yes, sir.

THE COURT: **Miss Locke?**

BY THE JUROR: Yes, sir.

THE COURT: **Mr. Bronson?**

BY THE JUROR: Yes, sir.

THE COURT: **Mrs. Clark?**

BY THE JUROR: Yes, sir.

THE COURT: **Mr. Brown?**

BY THE JUROR: Yes.

THE COURT: **Mr. Hall?**

BY THE JUROR: Yes.

THE COURT: **Mr. Long?**

BY THE JUROR: Yes, sir.

THE COURT: And **Mr. Rayburn?**

BY THE JUROR: Yes.

* * *

[1386-1387]

Mrs. White, during this week have you learned anything about this trial which would now make it impossible -- anything about this trial outside this Courtroom when you were sitting here before? I'm talking about something like a discussion or reading of a newspaper or hearing it on the radio, anything along these lines outside of this Courtroom which would now make it impossible for you to serve as a

fair and impartial Juror, in your own conscience and under your oath insofar as this second phase is concerned?

BY THE JUROR: No, sir.

THE COURT: All right; Mr. Broomfield?

BY THE JUROR: No, Your Honor.

THE COURT: Mrs. Hart?

BY THE JUROR: No, sir.

THE COURT: Mr. Henson?

BY THE JUROR: No, sir.

THE COURT: Mrs. Wright?

BY THE JUROR: No, sir.

THE COURT: Mr. Anderson?

BY THE JUROR: No, sir.

THE COURT: Mrs. Locke?

BY THE JUROR: No, sir.

THE COURT: Mr. Bronson?

BY THE JUROR: No, sir.

THE COURT: Mrs. Clark?

BY THE JUROR: No, sir.

THE COURT: Mr. Brown?

BY THE JUROR: No, sir.

THE COURT: Mr. Eldridge?

BY THE JUROR: No, sir.

THE COURT: Mr. Holl?

BY THE JUROR: No, sir.

THE COURT: Mr. Long?

BY THE JUROR: No, sir.

THE COURT: Mr. Rayburn?

BY THE JUROR: No, sir.

EXCERPTS FROM VOIR DIRE

EXPLANATION OF PROCEEDINGS TO
PROSPECTIVE JURORS

* * *

[28-31]

THE COURT: Ladies and gentlemen, I meant to discuss with -- in fact, before I let the other prospective Jurors go, I meant to explain to you what Phase One and Phase Two portion of a trial is in this particular aspect. I -- I just flat forgot it. Let me tell you, we're dealing with the charge of first degree murder.

In a first degree murder case, you have two separate phases of a trial. The first phase, I'm going to refer to as Phase One, and you'll hear the attorneys referring to Phase One portion of the trial later. The only question that you, the Jury, will be deciding is whether the Defendant is guilty or not guilty. That's your only question that you are to decide in Phase One. Now, assuming that you were to find the Defendant not guilty, then Phase Two portion of the trial would never come about, so that you would only have Phase One. Now, on the other side of the coin, assuming that you found the Defendant guilty of first degree murder, then Phase Two -- excuse me -- let me go back and explain something I should have gone on awhile ago.

In Phase One, if you found him not guilty of first degree murder, Phase Two would never come along. I've explained

that to you. If you found him guilty of anything except first degree murder, Phase Two would never come on. For example, if you found him guilty of second degree murder, then Phase Two would never come on. It would only come into play in the event that you find him guilty of first degree murder. Now, if you find the Defendant guilty of first degree murder, as charged, in the first phase, then Phase Two comes into play. Now, Phase Two, at that time additional evidence may come in or evidence that would not have been admissible in Phase One can come in in Phase Two, and the question that you will be answering in Phase Two is what recommendation does this Jury want to make to the Court as a sentence for this man. In the event you were to find him guilty of first degree murder as charged, there are two sentences that can be given to this man. One is death by electrocution.

The other one is life imprisonment. Those are the two alternatives that the Court has in the event you find him guilty of first degree murder in the first phase.

Phase Two, the Court is asking you to make a recommendation to me as to what you think I should give him. Additional evidence is presented to you and it's for the purpose of showing what's called aggravating circumstances versus mitigating circumstances, aggravating means -- meaning reasons putting to death; mitigating means reasons not to put him to death. Now, that's sort of generalities and the two attorneys will go into it a little bit more as to what the mitigation versus the aggravating circumstances are. But, after that part of it has been done and given to you, you would then find whether or not, in your opinion, the aggravating circumstances outweighed the mitigating circumstances and, if so, then

you would come back and recommend to the Court that this man be put to death. If you found that the mitigating circumstances outweighed the aggravating circumstances, you would come back and recommend to the Court that the Court give him life. The Court is not bound by your recommendation. The ultimate responsibility for what this man gets is not on your shoulders. It's on my shoulders. You are merely an advisory group to me in Phase Two. You can come back and say, Judge, we think you ought to give the man life. I can say, I disregard the recommendation of the Jury and I give him death. You can come back and say, Judge, we think he ought to be put to death. I can say, I disregard your recommendation and give him life. So that this conscience part of it as to whether or not you're going to put the man to death or not, that is not your decision to make. That's only

my decision to make and it has to be on my conscience. It cannot be on yours. You are merely advising me as to what you would do if you were sitting here. That's a quick overview of Phase One and Phase Two.

* * *

[42-43]

MR. OLDHAM: You don't believe in capital punishment; is that correct?

THE JUROR: Right.

MR. OLDHAM: Well, let me ask you this. Would it make any difference whether it was this case or any case? Would it make any difference of what type case it was that you don't believe in capital punishment?

BY THE JUROR: Yes, I think I'd vote -- I think he's too young to die.

MR. OLDHAM: Well, would it make any difference what type of case it is?

BY THE JUROR: It would make, yes; it

would.

MR. OLDHAM: Could you vote a death verdict of murder in the first degree in any case under any circumstances?

BY THE COURT: Excuse me. Mr. Oldham, explain yourself, now. They don't vote a death verdict. They only vote the question of guilt or innocence.

MR. OLDHAM: I'm sorry, Your Honor.

BY THE COURT: The obligation is mine.

* * *

[123-128]

THE COURT: All right. The Court intends to sort of give a brief thumbnail sketch of Phase One and Phase Two in a first degree murder charge as this. Any objection to that Mr. Oldham?

MR. OLDHAM: No objection.

THE COURT: Mr. Black?

MR. BLACK: No, sir.

THE COURT: All right. You

prospective Jurors, this type of case that we're considering today is what's called a first degree murder charge. The Defendant here is charged under an indictment of first degree murder. When you are considering a first degree murder case, there are two phases to a trial. For convenience sake, I'm referring to them and I think the attorneys will be referring to them, also, as Phase One and Phase Two. So that you will know the terminology, I want to give you a quick rundown as to what's involved in a criminal trial of this nature where there is a first degree murder charge. In Phase One, the only question that you are concerned with is: Is he guilty or not guilty of murder in the first degree or some lesser included offense, such as second degree, third degree or manslaughter. So that in Phase One, the only question that you will be voting on

is: Is the Defendant guilty of first degree murder or not guilty of first degree murder, and if not guilty of first degree murder is he guilty or not guilty of some, what's called, lesser included offense, which I will explain to you more if and when you are selected as a Juror. In the event, and I'm not assuming innocence or guilt in anything I'm saying today. I'm merely trying to explain to you the procedure. Assuming that you find the Defendant not guilty of first degree murder, then there would never be a Phase Two portion of the trial. You would only go through Phase One. Assuming that you found the Defendant guilty of second degree murder or third degree murder or some other lesser included, there would never be a second phase to this trial. It would end with Phase One and then the Court would take over from that point forward. Assuming, again, without

indicating whether or not he is guilty or not guilty, assuming for the explanation that you were to find this Defendant guilty of first degree murder as charged, that being from a premeditated design to effect the death of the person that he killed, or some other human being, but from a premeditated design you find that he is guilty as charged, then Phase Two comes into operation. At that time, after you have come back and, by the way, that -- that must be unanimous. All twelve who sit on it must have voted guilty of first degree murder as charged, or not guilty or guilty of some lesser included, but assuming all twelve of you were to vote for guilty of first degree murder as charged, at that point perhaps additional evidence would then be presented to you after you return that verdict. The Defendant would have the right to present testimony which he believes would show

what's called mitigating circumstances. The State Attorney would have the opportunity to present to you what he believes is called aggravating circumstances. Those are two terms that you are going to hear more and more about, aggravating versus mitigating.

Generally speaking, aggravating will mean that which tends to make you believe that the man should be put to death, mitigating meaning that which would tend to make you believe that he should not be put to death but should be given life imprisonment. If you were to find him guilty of first degree murder as charged, the Court is bound to make one of two sentences to the Defendant. One is death by electrocution; the other one is life imprisonment. The Court does not have the authority to do anything but that. This second time that you would go out to deliberate, the question that would be

asked of you is, please tell the Judge what you think should happen to this man. This is what is called a recommended verdict -- a recommended sentence. Excuse me -- a recommendation of a sentence. At that particular time that you vote, it is only necessary that a majority of you vote in a certain way. If you got out, after you have heard all of the testimony and I've given you additional law and the other procedure that you have to go through, if you felt that the aggravating circumstances outweighed the mitigating circumstances, and seven of you were to vote for death, then the recommendation that would come back would be, Judge, we recommend that you order that the man be put to death. If you get back in there on the second phase and you feel that the mitigating circumstances are equal to or outweigh the aggravating circumstances, and seven of you or more should vote for a

life sentence, then you would come back and recommend to the Judge, Judge, we feel under these circumstances that this man should not be put to death but should receive a life sentence. That is a recommendation only. The Court is not bound to accept your recommendation, so that I do not want you to feel that it is on your conscience to put the man to death. That is not your responsibility but that is the Court's responsibility and it is something that I have to put on my shoulders. If you come back and recommend that the man be put to death after Phase Two, I can say, I disagree with the recommendation; I hereby sentence the man to life. He gets life imprisonment. I'm the one that has to make that decision. If you come back in and you say, we recommend that the man be given life, I can say: I disregard your recommendation. I feel that the man needs

to be put to death, and I would order him to be put to death. So, the second phase of it is just an aid to the Judge to help him make up his mind, but that decision is not your decision.

You are the sole judge as to whether or not he is guilty or innocent. I am the sole determiner on whether or not the man receives life or is put into the electric chair. Do you feel any further explanation needs to be gone into at this time, Mr. Oldham?

MR. OLDHAM: No, Your Honor.

THE COURT: Mr. Black?

MR. BLACK: No, sir.

* * *

[169-174]

THE COURT: As I just indicated to you, this is a case of what's called murder in the first degree. In the case of murder in the first degree, there are two phases to a criminal trial. We have

been referring to and I refer to them as Phase One and Phase Two of the trial. This is what the attorneys will be referring to, also.

In a case of this nature where there is a first degree murder charge, the first question that the twelve that are finally picked to serve on the jury must answer is the Defendant guilty or not guilty of murder in the first degree. That is your sole question. No question about penalty or anything along these lines. The sole question is he guilty of murder in the first degree as charged. Assuming, and without trying to indicate whether or not I believe the Defendant is guilty or innocent, merely for the purposes of explaining Phase One and Phase Two, assuming that you found that the Defendant was not guilty of murder in the first degree -- in other words, you found he wasn't guilty of anything and you voted

not guilty, then Phase Two would never come about. No question of penalty would ever come about. In the event that you felt that he wasn't guilty of first degree murder but he was guilty of, say, second degree murder, third degree murder or some other lesser included offense within the first degree murder, the second phase of the trial would never come about. The Court would merely go on with the penalty portion of it, but assuming and, again, merely for an explanation viewpoint, assuming that you found the Defendant was in fact guilty of first degree murder as charged, then Phase Two of the trial would come into being. In Phase Two of the trial -- excuse me -- in the question of innocence or guilt in Phase One, that must be by unanimous decision. All of you must vote guilty of murder in the first degree or all of you must vote not guilty or all of you must vote guilty of some lesser

included. Now, when I say all of you must vote in that manner, that -- only in the event you returned a verdict. I'm not telling you that when you get back into the room that all of you have to vote the same way. You don't. You can have what's called a hung jury, and that's the right of our jury system, is to have a hung jury. So, I'm not telling you that just because eleven of us vote one way and you think something else that you must vote in that manner because I'm not telling you that, but in the event you return a verdict in Phase One, it will be a unanimous verdict. In other words, all of you must have voted before you bring the verdict back to me of not guilty or of guilty of some -- first degree or some lesser included.

Now, if all of you vote for first degree murder, as charged, then a second phase comes about. In this phase of the

trial, additional testimony can be presented by the State to show what's called aggravating circumstances. That's a key word. You are going to be hearing that in a little while. Also, the Defense Counsel can bring in additional evidence that may not have been admissible in the first phase but now would be admissible in the second phase to show what's called mitigating circumstances. That, too, is a key word. Generally speaking, for demonstrative purposes, the term "aggravating circumstance" means that type of circumstances that would tend to make you believe that the man should be put to death. Mitigating circumstances, on the other hand in the general sense of the term, means that type of circumstances which tends to make you believe the man should not be put to death but should be given a life sentence. If you found him guilty of murder in the first degree, the

Court is bound to find one of two penalties, either the penalty of death by electrocution or life imprisonment. The Court cannot do anything except one of those two things. Now, when -- after you've heard the evidence in Phase Two portion, if any additional evidence is introduced, you go back into the jury room and you can consider the evidence that was brought to you in Phase One and the evidence in Phase Two and at that time vote whether or not you want to recommend to the Judge whether the Judge give him death in the electric chair or life imprisonment. That vote must only be done by plurality, which means seven of you must vote in one manner or another. That would mean that if you got back in the juryroom and five believed that he should be put to death and voted in that manner and seven believe that he should not be put to death but given life, then you

would come back with the recommended verdict to the -- recommendation to the Judge that I sentence him with life -- whichever one I said the seven voted. That's the way that your recommendation would come back. If, on the other hand, seven of you believed that he should be put to death, and five believed that he should be put -- given life, then the recommendation that would come back to the Judge is death, by plurality of the vote.

One thing is very, very important. That is only a recommendation to the Judge. It is not upon your conscience whether this man goes to the electric chair or not but it's solely upon the Judge's conscience. Even if you came back and recommended death, the Court has the right and the power to say, I disregard your recommendation and give the man life imprisonment. If you come back and say the man should not be put to death and I

disagree with that, the Court has the power to say, I disregard your recommendation of life and put him to death. The ultimate responsibility of whether this man shall be put to death or not put to death is on the Court's shoulder and upon the Court's conscience and is not upon your conscience.

* * *

[183-187]

THE COURT: As I just read to you, the case that we're discussing here today involves a first -- a charge of first degree murder. In a first degree murder case, there are two phases to a trial. The Court is going to be referring to -- the term I'm going to use will be Phase One and Phase Two. Now, the attorneys, also, will be using that terminology, Phase One and Phase Two; Phase One meaning the first portion of the trial. In Phase One, the only question that will be

presented to the jury, and there will be twelve of you, is the Defendant guilty of first degree murder or not; yes or no, and if the answer is no, he's not guilty, then you could find him not guilty, period, of any crime or you could find him guilty of some -- what's called -- lesser included crime, such as second degree murder, third degree murder or some lesser included than that. That vote by the twelve of you would have to be unanimous. In other words, if you return a verdict of not guilty or guilty of first degree murder or some lesser included, all twelve of you must have voted for that particular verdict in that manner.

Now, assuming, and without giving any indication as to whether or not the Court believes the Defendant is guilty or not, but just assuming for the purposes of trying to explain to you the two phases in this type of case, assuming that you were

to go back in there and you found the Defendant not guilty, not guilty of any crime whatsoever, then Phase Two of the crime -- Phase Two of the trial would never come about. In the event you went back there and you found him guilty of second degree murder or any of the lesser included offenses, then Phase Two would never come about; but assuming, and again only assuming for illustration purposes, that you found him guilty of murder in the first degree, then the second phase comes into effect. That means that after you come in with a verdict and you said, yes, we believe the man to be guilty of first degree murder as charged, then the second phase commences. At that point the State would have the right to bring in and present to you what's called aggravating circumstances. The Defense at that point would have the right to present additional evidence if they desire to do so, to show

you what's called mitigating circumstances. There may be some types of evidence that's admissible in Phase Two that are not admissible in Phase One. So they -- both the State and the Defense gets an opportunity to present further evidence to you.

The term "aggravating circumstances" is a term that you're going to be hearing a lot of and the term "mitigating circumstances" is a term you're going to be hearing a lot of. As a general statement, consider the term "aggravating circumstances" to mean those types of circumstances that convinces you that the man should be put to death rather than given life imprisonment. For "mitigating circumstances," consider those to be the type of circumstances that tend to make you believe the man should not be put to death but should be given life imprisonment. Assuming that you find him,

in the first phase, guilty of first degree murder, the Court only has two sentences that he can consider -- that I can consider. Number one is death by electrocution and, number two, is life imprisonment. I cannot do anything but one of those two things. Now, after the evidence has been presented to you in the second phase, you go back and vote again. This time the question is: Do you, the jury, want to recommend to the Court that this man be given death or do you want to recommend to the Court that he be given life imprisonment rather than death. That vote, out of the twelve, seven of you must cast your ballot in a particular way. For an example, if you get back in there and seven of you believe that you would not want him put to death, or recommend to the Judge that I order him to be put to death, and five of you wanted him to be put to death, the recommendation

that would come back to the Judge is life, not death. Did I -- did I say -- whichever way the seven voted is the way that you would come back and recommend to the Judge, for either life imprisonment or death. Now, one thing that is very important that I have tried to stress to all of the Jurors in this case, that is a recommendation only. You do not decide whether the man will be put to death or given life imprisonment. That falls upon me as the Court, as I sit here as the Judge. You may come back and recommend to me that he be put to death. The Judge has the power to say, I disregard the recommendation of the jury, and give him life imprisonment. You can come back and say, I recommend that he be given life imprisonment. The Court has the authority and the duty to determine whether or not he will, in fact, get life or whether I want to give him death. So, the question

as to whether or not this man is to be sent to death in Phase Two, assuming you get to that, does not fall upon your conscience or your shoulders. They only fall upon mine. The only purpose of the recommendation to the Court is merely as an advisory group to help me make up my mind as to the way that I want to do it. Is there anything further you think should be explained, Mr. Oldham?

MR. OLDHAM: No, Your Honor.

THE COURT: Mr. Black?

MR. BLACK: That's fine, Judge.

* * *

[229-234]

THE COURT: All right. For the ones that have already heard this, just bear with me. It makes it a lot easier if I go ahead and explain to the new prospective Jurors the procedure this type of trial has.

We're dealing with a charge of first

degree murder. In a first degree murder charge, there can be two phases to a trial, and I'll be referring to them as Phase One and Phase Two. Also, the attorneys will be referring to Phase One and Phase Two; so, that's what they will be talking about, the two separate phases of the trial. Phase One of the trial, the only question that's asked of the jury is: Is the man guilty of some crime or not guilty. You can come in, and assuming that -- and only assuming, without trying to indicate whether or not I believe the Defendant is guilty or innocent, only assuming for purposes of illustration, that you were to go out and come back in and find that the man was not guilty, not guilty of anything. Number one, all twelve of you would have had to cast that ballot. It must have been an unanimous vote in order to come back with that type of verdict. Then, Phase Two would never

come about. You would end up with Phase One. Assuming that you went out and found that he was not guilty of first degree murder but that he was guilty of second degree murder, third degree murder or some other what's called lesser included, which I will explain to you later on in the trial, if you found him guilty of anything except first degree murder, then there would never be a Phase Two portion of the trial. Then, the Court would take over and give punishment in accordance with the law.

But, now, assuming, and again let me emphasize it's only for illustration purposes, assuming that you go out and you find that the Defendant is, in fact, guilty of first degree murder as charged. Here, again, that would have had to have been an unanimous verdict. The first phase of the trial, no matter what you find, has to be by an unanimous

vote. That means that all twelve of you must have ended up voting in that particular way. If you found him guilty of first degree murder as charged, then Phase Two would become applicable. In Phase Two, after you had gone out and come back in and said, yes, Judge, we feel that the Defendant is guilty of first degree murder, then the State would have the right to come forward and present some more evidence to you. The State would be attempting to present to you what is called aggravating circumstances. The term "aggravating circumstances" is a very important term that you're going to be hearing more from the attorneys talk about. Aggravating circumstances, in a general term, is to be interpreted to mean those types of circumstances that make you believe that the man should be put to death rather than given life imprisonment. The Defense would have the

right, then, to come forward and present to you what's called "mitigating circumstances". There, again, from a general term, I think you could consider mitigating circumstances to be those circumstances that tend to make you believe that the man should be put to -- given life rather than put to death. When you get through with -- with that evidence being presented, then you are to weigh whether the aggravating circumstances outweigh the mitigating circumstances or whether the mitigating circumstances outweigh or are equal to the aggravating circumstances. When this happens you're in the juryroom. The only verdict that you're trying to come up with at that point is a recommendation to the Judge as to what the Judge should do to this man. If you found him guilty of first degree murder, the Court has two alternatives. One, the Court can order

the man to be put to death by electrocution or, number two, he can order that he be given life imprisonment. Those are the two alternatives that the Judge has in a first degree murder case. So, now, you have heard the evidence based on the guilt, plus you've had the evidence that was shown to you that -- that would tend to show that it was either aggravating or mitigating circumstances. You've gone back into the juryroom and you get together and at this vote there must only be a majority of this twelve, which means seven. Seven must vote for either recommending to the Judge that the Judge give him death or give him life imprisonment. In other words, if five of you wanted to give him life imprisonment and seven of you wanted to give him death, you would come back with the recommendation of death, and vice versa. If seven of you wanted to give him life

and five wanted to give him death, then you would come back with the recommendation of life. The most important portion -- the most important thing on this is for you to understand that that is a recommendation to the Judge. It's not on your conscience and it's not on your shoulders and it's not your responsibility to decide whether or not this man will be put to death. That's on the Court's shoulders and it's the Court's responsibility. You could come back in and recommend to the Judge that the man be given life. I can decide that I will disregard your recommendation and I can order him put to death. You can come back in and recommend to the Judge that he be given death. I can say, I will not follow that recommendation; I will give him life imprisonment. So that the ultimate responsibility for whether or not the man is put to death or not put to

death is not upon your shoulders or in your conscience. It's on the Court's -- that's the Court's responsibility. It's merely a tool that the Court uses. I will sit here and I will hear all of the evidence, also, but it's merely a tool to help the Judge decide what he wants to do. The responsibility and the obligation is on the Judge, not upon the jury.

Any further explanation, Mr. Oldham, you feel is necessary?

MR. OLDHAM: No, Your Honor.

THE COURT: Mr. Black?

MR. BLACK: No, sir.

* * *

[242-247]

THE COURT: All right; here, again, the rest of the Jurors will just have to bear with us.

This is a charge of first degree murder and in a charge of first degree murder, there can be two phases to a

case. Now, I'll be referring to these two parts of the case as Phase One and Phase Two. This is also the terminology that the attorneys will be using later on in questioning you concerning these phases.

Phase One of this particular case, in a first degree murder, the question is presented to the jury as to whether or not the Defendant is guilty of some crime or not guilty. That's the only question that's asked to the jury in Phase One. The jury is -- excuse me -- the jury is asked to determine as to whether or not the Defendant is guilty of first degree murder as charged or second degree murder, third degree murder or some other lesser included offense which I will explain to you later on in the trial, or whether or not he's not guilty of anything. When you retire after hearing the evidence and I give you the instructions on the law to determine that question, there will be

twelve of you there. Twelve -- assuming that you returned a verdict, then that verdict must be unanimous. All twelve of you must have voted either not guilty of anything or not guilty of first degree murder but guilty of second degree murder, third degree murder or any of the lesser included offenses, or the other thing that you could find would be guilty of murder in the first degree. Now, assuming you find not guilty; then, Phase Two would never come into play. Assume that you find that he was not guilty of first degree murder but was guilty of manslaughter or some of the other lesser included offenses, second degree murder or whatever the case may be, anything except first degree murder, then Phase Two would not come into being, but if, and assuming, and it's merely for illustration purposes and I am not -- do not want you to take anything that I say to indicate whether or

not I believe the Defendant is guilty or not guilty, but it's merely for illustration purposes -- assuming that this jury found that this Defendant was guilty of first degree murder as charged, then Phase Two would come into play because once the murder in the first degree charge has been found, then the Court has two alternatives for a sentence to be given to the man. The Court can either give the man death by electrocution or life imprisonment. Now, under our system the Court asks the jury for a recommendation for what the jury thinks the Court should do. Before you do that, after you found him guilty in Phase One, then more evidence may be presented to you by the State that would tend to show what's called aggravating circumstances. Now, the term "aggravating circumstances" is another term that you're going to be hearing the attorneys refer to. So, it's

quote a technical important term. Generally speaking, the term "aggravation", I think, can be interpreted to mean that it's the type of circumstances that tends to make you believe that the man should be put to death for the murder he committed. The other side of the coin is -- and the Defense may come forward if they elect to do so and present what's called "mitigating circumstances." Now, mitigating circumstances is another technical term that you will be hearing talked about and I think that you can consider that from the general viewpoint that those are the type circumstances that tend to make you believe the man should not be put to death for this murder but should be kept in prison for a long period -- should be given life imprisonment for the murder.

The reason for the second phase, one

of the reasons for the second phase is additional evidence can be presented in the second phase that may not be admissible in the first phase. So, it opens up and gives the Defendant a chance to present evidence that he could not have presented in the first case -- the first part of the case that he can present in the second part, or the State could not have presented certain types of evidence in the first part of the case but they can in the second portion of the case. The most important thing for you to remember about a recommendation to the Judge on Phase Two is that it's exactly that. It's only a recommendation. The Judge is not bound to do what you have suggested that the Court would do. When you go back into the juryroom and this particular vote for the recommendation does not take unanimity. All of you don't have to vote for the same thing. Then, it only takes

what's called a plurality. Seven of you must vote to recommend to the Judge one of two things, either life imprisonment or death. If you go back there and five of you want to give him life -- not -- the Court gives it to him -- that you want to recommend that the Court give him life and seven of you wanted to recommend that the Court give him death, then the recommendation to the Court would be death because seven voted in that manner, and vice versa is true. If seven of you voted for life and five of you for death, the recommendation that would come back to the Court would be life. That is only a recommendation. It should not be on your conscience nor is it on your shoulders whether or not this man will be put to death or not. That is the Court's sole responsibility and not the Jurors' in any manner whatsoever. The jury can come back and recommend that this man be given

death. The Judge has the power and the obligation -- it is my obligation to determine whether or not he should be put to death or life. I can say I disregard the recommendation or I've considered the recommendation but I'm not going to follow it, and I can give him life, if you recommend death. You can come back and recommend life and I can say I've considered it but I'm not going to follow it and I can give him death. So, the ultimate decision as to whether or not the man lives or dies has to be on the Court's conscience and it's the Court's obligation. The Court is not trying to shuttle this obligation off to the jury at all, and I don't want you to feel that you determine whether or not this man lives or dies because you don't. It's only a tool that I can utilize to make up my mind ultimately whether or not he should be put to death or given life imprisonment.

Have I covered all the points that I need to, Mr. Oldham?

MR. OLDHAM: Yes, Your Honor.

THE COURT: Mr. Black?

MR. BLACK: Yes, sir.

* * *

[288-293]

THE COURT: This particular case that we're dealing with is a charge of first degree murder. A first degree murder case is different than any other case that the Court has to try. In a first degree murder case, there are two parts to a trial. I'm going to refer -- be referring to these as Phase One portion of the case and Phase Two portion of the case. The attorneys will be referring to this phraseology, also. They will be asking you later on questions about -- well, now, if we're in Phase One and you do so-and-so, what's going to happen, or in Phase Two. So, please try to listen carefully

and I'll try to explain to you what Phase One and Phase Two is in a first degree murder trial. If you're elected to sit on the Jury here -- selected to sit on the Jury here, the first time -- the first phase, the first question that will be asked of the twelve of you who end up sitting as our Jury will be asked to determine is the Defendant guilty of any crime whatsoever or not guilty of any crime. That will be the only question that you will be determining. You will go back into the Juryroom and assuming you reach a verdict, all twelve of you will come back and tell -- tell the Defendant, we find you not guilty of any crime, or we find you not guilty of first degree murder but find you guilty of second degree murder, third degree murder or some other lesser included offense, which I will explain to you later on in the trial. Now, if you come back with any of those

verdicts, either not guilty of any crime or guilty of any crime less than first degree murder, then there will never be a Phase Two portion of the trial. It will end right there so far as the Jury is concerned and then it's the obligation of the Court to go from that point forward, but assuming, and this is merely for illustration - all the talking I'm doing to you now is merely for illustration purposes. Do not take anything that I'm saying now to indicate whether or not I believe the Defendant is guilty or not guilty because I don't know and that's not my job. That's your job, but assuming for illustration purposes that you come back and say, Defendant, we find you guilty of first degree murder as charged, then, Phase Two comes into play. At that point in the trial, you have found the Defendant guilty of first degree murder. Then, additional evidence can be presented to

you by either the State or the Defense at that time. Now, the reason for the second time to have evidence presented to you is in Phase One, it may not be admissible. There are certain types of evidence that they can bring in in Phase Two that they could not bring in in Phase One. Once we get into Phase Two, then the State would be entitled -- excuse me -- then the State would be entitled to present evidence to you tending to show what's called aggravating circumstances. The term "aggravating circumstances" is one of those legal niceties that we talk about, technical words, aggravating circumstances. You're going to be hearing that referred to in the questioning by the attorneys. I think that you can consider the term "aggravating circumstances" from a general statement to be that type of circumstances that tends to make you believe that the person should be put to

death rather than given a life imprisonment. The Defense, on the other hand, will be presenting what's called "mitigating circumstances". Here, again, that's a technical term, mitigating circumstances, but from a general viewpoint I think that you can say that mitigating circumstances are those type of circumstances that makes you believe that the man should be given life imprisonment rather than be put to death. So those are some technical terms that you will be hearing throughout this trial.

Now, when that portion of the trial has been presented to you, you will again go back into the Juryroom. At this time you will be voting whether or not to recommend to the Judge that the defendant receive a life imprisonment or that the Judge give him death by electrocution. This vote only takes what's called a plurality. Only seven of you must vote a

certain way. For an example, if five of you were to vote to give him life imprisonment, and seven of you were to vote to recommend to the Judge that he be given death, then the recommendation that would come back to the Judge would be death because seven of you would control. If, on the other hand, seven of you were to vote for life and five of you vote for death, then the recommendation coming back to the Judge is to give the man life.

The most important thing for the Jury to remember, in my estimation, on this recommendation of the sentence to be given is it's exactly that. It's only a recommendation. The Judge is not bound by your recommendation. The obligation and the responsibility of whether or not this man will ultimately receive, assuming he's found guilty of first degree murder, the ultimate obligation as to whether or not

he will be given death or life is the Court's. It has to be on my shoulders and on my conscience. It is not on the Jury's conscience. You can come back and recommend to the Court that he be given death by electrocution. I can say, I considered your recommendation but I feel that the man should be given life imprisonment and I have the power and the obligation to give him life imprisonment. You can come back and recommend that he be given life imprisonment and I can say I've considered your recommendation but I disregard it or I'm not going to follow it. I feel that the man should get death and I'll give death by electrocution. So that the ultimate conscience that has to live with whether or not this man will be put to death or not is not on your conscience but it's on my conscience. So I want to make certain that you understand, you will not

determine whether this man is put to death or not put to death. I will have that obligation and that's my responsibility.

Anything further you think needs to be covered, Mr. Oldham?

MR. OLDHAM: No, Your Honor.

THE COURT: Mr. Black?

MR. BLACK: No, sir.

* * *

[351-357]

(Thereupon the Jurors were duly sworn by the Clerk to try the case at 9:18 A.M., after which the following proceedings were had):

THE COURT: All right. Again, for the benefit of the two that are about to be questioned with the possibility of becoming the alternate Jurors, the Indictment reads that the Defendant, Aubrey Dennis Adams, did, in Marion County, on the 23rd day of January, 1978, did unlawfully from a premeditated design

to effect the death of Trisa Gail Thornley, or any human being, did kill and murder Trisa Gail Thornley, a human being, by strangling the said Trisa Gail Thornley, in violation of Florida Statute 782.04. I again remind you that the Indictment is not to be considered as evidence but is the mere formal accusation against the Defendant. You must not consider it as evidence of the Defendant's guilt and you must not be influenced by the fact that this Indictment has been filed against him. Before I go on, it would be the Court's intention now to explain to the two alternate Jurors what Phase One and Phase Two of the trial consists of. Any objections, Mr. Oldham?

MR. OLDHAM: No objections, Your Honor.

THE COURT: Mr. Black?

MR. BLACK: No, sir.

THE COURT: All right. Mrs. White and Mrs. Morris, in a case of this nature,

which is a charge of first degree murder, there is a possibility of two separate phases within the trial. I will be referring to these phases as Phase One and Phase Two. Also, the attorneys later on, when they begin questioning you, will be talking about, well, if we were in Phase One, if certain things happen, what would you do. So it's very important that you understand about Phase One and Phase Two. The first question that will be presented to the Jury and what we refer to as Phase One, the only question that you will be answering in Phase One is whether or not this Defendant is guilty or not guilty. You can, for an example, come back -- and anything that I say is only for illustration purposes and it's not to be taken by you as any indication as to whether or not I believe the Defendant is guilty or innocent, but you could go back after all the evidence has been presented

to you, go back into the Juryroom and you may find the Defendant not guilty of anything. So if you find the Defendant not guilty of anything, Phase Two would never come about. You could go back into the Juryroom and come back out and say, well, the Defendant is not guilty of murder in the first degree but is guilty of murder in the second degree, third degree or some -- some other lesser included offenses, which will be explained to you later on in the trial. If you find him guilty of anything except first degree murder, then Phase Two would never come into being, but assuming, and again only for illustration purposes, assuming that you go back after the first phase of the trial has been presented to you and you come back and say, yes, the Defendant is guilty of first degree murder as charged. Then, Phase Two does come into play. At that point you come back into

the Courtroom. The State has an opportunity to present additional evidence to you and they will be presenting types of evidence that's called -- that's trying to show you what's called aggravating circumstances. The term "aggravating circumstances" is a technical term that you'll be hearing later on in some questioning. From a general viewpoint, I think that you can assume that-- or you can interpret the term "aggravating circumstances" to mean those types of circumstances which tends to make you believe that the Defendant should be put to death. On the other hand, the Defense will have an opportunity to present to you other testimony and other evidence trying to show you what's called mitigating circumstances, and, here again, the mitigating circumstances is a technical term but from a general viewpoint you can interpret it to mean the type

circumstances which tends to make you believe that the Defendant should be given life imprisonment rather than the harsher, putting the Defendant to death. The reason that you have a second phase, rather than presenting it all at one time, is that there are certain types of evidence that cannot be presented in Phase One, the question of guilt or innocence, that can be presented to you in Phase Two; so that you can then come in with a recommended verdict. Phase Two, when you -- let me go back just a minute. Phase One, the question of guilt or innocence, if you come back with a verdict it would have to have been a unanimous verdict. In other words, all twelve of you must have voted for guilty as charged, guilty on some lesser included offense or not guilty. All twelve of you must have voted in that manner.

Phase Two, when you go back in to

vote, only the plurality must have voted in a certain way. In other words, the question that they ask of you is: Do you recommend to the Judge that this man be given life imprisonment or be put to death by electrocution. That vote only takes seven people. Seven out of the twelve must vote a certain way, either for death by electrocution -- the recommendation that the Judge give him death by electrocution or a recommendation that he be given life imprisonment. Now, the most important thing to remember in Phase Two is that the second vote that you take is exactly what it is, a recommendation to the Judge. The Judge is not bound to follow that recommendation. You will not decide whether or not this man will be put to death or not put to death. That is the Judge's decision and I am the only one that will make that decision, or whoever sits here at that particular time if it

not be me, but you should not feel on your conscience or that it's on your shoulders whether or not this man is going to be put to death or not because that is not your decision. You may come back and recommend that this man be given life imprisonment. The Court then says, I've considered it and I disregard it and I can put the man -- have the man put to death or order that he be put to death. On the other hand, you can come back and recommend that he be put to death and I can say, I've considered it and I'm not going to order that the man be put to death and I can give him life imprisonment. So the responsibility and the conscience it has to bear upon as to whether or not this man is going to be put to death or not is not yours; it's mine. The recommendation that the Jury makes is strictly that. It's a recommendation; it's another tool that the Judge uses to

reach his final determination, but it should not be on your conscience nor is it your responsibility. That's the Court's responsibility.

Mr. Oldham, do you know of anything further that needs to be covered on that aspect?

MR. OLDHAM: No, Your Honor.

THE COURT: Mr. Black?

MR. BLACK: No, sir.

* * *

[365-366]

THE COURT: Mrs. White, it's become necessary that the Court inquire a little bit more concerning the imposition or the possible imposition of the death penalty and your feelings concerning it. You heard the Court explain to you, did you not, that it is not you who will impose the death penalty?

BY THE JUROR: Yes, sir.

THE COURT: All right. And you also

heard the Court say that no matter what you recommend, the Court is the one that has the obligation and duty to determine whether or not this man is put to death. You understand?

BY THE JUROR: Yes.

* * *

[386-391]

THE COURT: Mr. Eldridge, in a case of this nature, which is a first degree murder charge, there is a possibility that there can be two phases to the trial. It's very important that you understand these two phases so that later on in questioning or in the trial, if you are selected, that you don't misunderstand what's going on. Phase One is the portion where evidence is presented to you with the idea of asking the Jury the sole question, is the Defendant guilty or not guilty. That's the only question that you answer in Phase One. There's no question

about penalty or what's going to happen to the Defendant or anything along these lines. The only question the Jury answers in Phase One is: Is the Defendant guilty or not guilty. Now, if you were to go back into the Juryroom and are able to vote, since you are being selected as an alternate Juror, but if you are able to vote, then the Jury would come back and were to find -- and this is for illustration purposes only; do not -- don't take anything I'm saying as an indication as to whether or not I feel the Defendant is guilty or not guilty. That's your decision to make. My talking to you is for illustration purposes only.

Assuming that you were to go back in there and you came back and found that the Defendant was not guilty, not guilty of anything. Then, there would never be the second phase of the trial. If you went back in and came back out and said the

Defendant is not guilty of first degree murder but is guilty of second degree murder, third degree murder or anything else that's called lesser included offenses, anything but first degree murder, if you found him guilty of something other than first degree murder, there would never be a Phase Two portion of the trial, but in the event, and again it's for illustration purposes only, in the event that you were to go back and you came back out and said, yes, we find the Defendant guilty of murder in the first degree, then, Phase Two would come into being. Now, the first vote, if you come back with a verdict, the first time that you come back with a verdict, either guilty , not guilty or guilty of some lesser included offense, that must have been by twelve people. All twelve of you must have voted in a particular way, either guilty as charged or not guilty or

guilty of some lesser included offense, but it must have been a unanimous vote.

All right; you come back and you have told the Court, yes, we find the Defendant guilty of first degree murder as charged. At that point, additional evidence can be presented to you. The State may want to introduce some more evidence to you tending to show what's called aggravating circumstances. The term "aggravating circumstances" is one of these technical niceties that you will be hearing talked about but from a general viewpoint you can interpret the term "aggravating circumstances" to mean that type of circumstances which tends to make you believe that the man should be put to death rather than -- excuse me -- those circumstances which tend to make you believe that you should recommend to the Judge that he put the man to death rather than give him life imprisonment. On the

other hand, the Defense will be trying to present evidence to you, or has the right to do so, trying to show you what's called mitigating circumstances. Here, again, mitigating circumstances is a technical term that you will be hearing, but I think you can interpret -- from a general viewpoint, you can interpret the term "mitigating circumstances" to be that type of circumstance which makes you believe that you should recommend to the Judge that the Judge give him life imprisonment versus death. In other words, mitigating being very bad circumstances -- excuse me -- aggravating being very bad circumstances and mitigating being not so bad circumstances. At this time you would retire again and on this vote, the vote that would finally come back in the event you come back with a recommendation to the Judge, seven of you must have voted in one way or the other. It doesn't take all

twelve of you this time. It's only a recommendation to the Judge and there's only a plurality that's required, which would be seven out of the twelve. In other words, if you got back in to -- you came back out; seven of you have voted for -- to recommend to the Judge that the Judge order him be put to death; five had voted that they wanted to give him -- recommend to the Judge to give him life imprisonment. The recommendation that would come back to the Judge would be recommending to the Judge that the man be given death, or vice versa. If seven of you voted to give him life or recommend that he be given life, five wanted to recommend that he be given death, the recommendation that would come back to the Judge is, Judge, we recommend that you give life. The most important thing, I think, for a Juror to remember is in reference to the recommendation. It is

merely that, exactly what it says. It's a recommendation to the Judge. The Judge is not bound to follow that recommendation. You may come back and recommend that I order that the man be put to death. The Judge has the obligation and the duty to say, I disagree with the recommendation; I order the man to be sentenced to life imprisonment, or, you can come back and say, we recommend that the man should be put into prison for life and not be given death. The Judge has the obligation and the duty to say, I disregard that; I feel that the man should be put to death, and I can order him to be put to death. So the conscience that must bear whether or not the man should be put to death or not is not your conscience; it's the Court's conscience. It's on my shoulders and it's my responsibility to do that. It is not on your shoulders nor on your conscience. You cannot order this man put

to death or not put to death. That's not your job. Your recommendation to the Judge is one of the tools that the Judge uses to try to make up his mind. It's not the only tool, by any stretch of the imagination. So that it is strictly a recommendation and nothing more.

Mr. Oldham, do you feel anything else needs to be covered in this aspect?

MR. OLDHAM: No, Your Honor.

THE COURT: Mr. Black?

MR. BLACK: No, sir.

EXCERPTS FROM TRIAL

* * *

PRELIMINARY INSTRUCTION TO THE JURY - **GUILT/INNOCENCE PHASE**

[416]

THE COURT: It is your solemn responsibility to determine the guilt or innocence of the Defendant and your verdict must be based solely on the evidence as it is presented to you in this

trial and the law on which this Court will instruct you at the close of the trial.

* * *

FINAL INSTRUCTION TO THE JURY -
GUILT/INNOCENCE PHASE

[1346]

You alone, as Jurors sworn to try this cause, must pass on the issues of fact, and your verdict must be based solely on the evidence or the lack of evidence and the law as it is given to you by the Court.

* * *

[1355]

If you find the Defendant guilty of murder in the first degree, then at a later proceeding you will render an advisory sentence to the Court recommending that the Defendant be sentenced to life or death. The Court may accept such recommendation and sentence the Defendant as recommended, or it may, under certain circumstances, reject such

recommendation and sentence the Defendant to either life or death.

EXCERPTS FROM PENALTY PHASE

* * *

PRELIMINARY REMARKS TO JURY

[1388-1390]

THE COURT: All right. The one thing I meant to do earlier than that, and I'll do it now, I'll remind you that you have been previously placed under oath to try this case to render a fair and impartial verdict. That would have been your original verdict as well as this verdict. You will note that I'm not going to require that you be sworn again but I want to remind you that you have already been sworn and that oath that you took approximately a week and a half ago is still applicable now so that if anything does happen during this period of time that we're trying the second phase of this case, if something comes forward to you

that makes it in your own conscience and under your oath, something you should reflect to the Court, please do so.

Ladies and gentlemen of the Jury, you have found the Defendant guilty of murder in the first degree. The punishment for this crime is either death or life imprisonment. The final decision as to what punishment shall be imposed rests solely upon the Judge of this Court. However, the law requires that you, the Jury, render the Court an advisory sentence as to what punishment should he -- should be imposed upon the Defendant. You will recall when I first started this case, I told you that there would be two parts to this trial in the event you found first degree murder. You have now found first degree murder and that was the first part. Now, it's necessary that we go into the second part. During this part, both the State and the Defense will have an

opportunity to present additional testimony to you other than what you've already heard to show either what's called aggravating circumstances versus mitigating circumstances. The State will have a right, if they feel it's necessary, to show additional evidence that tends to show aggravating circumstances. The general term, what you can generally believe or a good definition that I think for aggravating circumstances can be defined as those circumstances which tend to make you believe that this man should be put to death rather than given life imprisonment. On the other side of the coin is the mitigating circumstances. Mitigating circumstances will -- at least, the Defense will have the opportunity, if they feel any additional evidence is required or desired, to show you what's called mitigating circumstances. Here, again, from a general viewpoint, you can

assume that mitigating circumstances are those circumstances which tend to make you believe that this man should be given life rather than put to death in the electric chair.

Anything further that the State feels that I should caution the Jury about?

MR. OLDHAM: No, Your Honor.

THE COURT: Mr. Black?

MR. BLACK: No, sir.

* * *

PROSECUTOR'S CLOSING ARGUMENT

[1476]

The opinion of yours is advisory. Be fair and impartial to this Defendant and also to the people to the State of Florida. If you think the aggravating circumstances outweigh the mitigating, you know how to vote. If you think there's more mitigation than there is aggravating, you know the way to vote. Any way you people decide will satisfy the State of

Florida.

* * *

INSTRUCTION TO THE JURY

[1479-1487]

THE COURT: Ladies and gentlemen of the Jury, it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for his crime of first degree murder. As you have been told, the final decision as to what punishment should be imposed is the responsibility of the Judge. However, it is your duty to follow the law which will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

Your verdict should be based upon the evidence which has been presented to you in these proceedings.

The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence: (A), that the crime for which the Defendant is to be sentenced was committed while the Defendant was under sentence of imprisonment; (B), that at the time of the crime for which he is to be sentenced, the Defendant had been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person; (C), that the Defendant, in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons; (D), that the crime for which the Defendant is being sentenced was committed while the Defendant was engaged in the commission of an attempt to commit

or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb; (E), that the crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (F), that the crime for which the Defendant is to be sentenced was committed for pecuniary gain; (G), that the crime for which the Defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any Governmental function or the enforcement of laws; (H), that the crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel.

Heinous means extremely wicked or shockingly evil.

Atrocious means outrageously wicked

and vile.

Cruel means designed to inflict a high degree of pain, utter indifference to or enjoyment of the suffering of others; pitiless.

In considering these aggravating circumstances, you must not consider any physical change in the body of the victim after death.

Where two or more aggravating circumstances refer to the same aspect of the crime, you shall consider them as constituting only one aggravating circumstance.

If you do not find that there existed sufficient of the aggravating circumstances which have been described to you, it will be your duty to recommend a sentence to life imprisonment.

Should you find sufficient number of these aggravating circumstances to exist, it will then be your duty to determine

whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist. The mitigating circumstances which you may consider, if established by the evidence, are these: (A), that the Defendant has no significant history of prior criminal activities; (B), that the crime for which the Defendant is to be sentenced was committed while the Defendant was under the influence of extreme mental or emotional disturbance; (C), that the victim was a participant in the Defendant's conduct or consented to the act; (D), that the Defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the Defendant's participation was relatively minor; (E), that the Defendant acted under extreme duress or under the substantial domination of another person; (F), the

capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; (G), age of the Defendant at the time of the crime.

The aggravating circumstances which you may consider are limited to those upon which I've just instructed you. However, there is no such limitation upon the mitigating factors which you may consider.

Aggravating circumstances must be established beyond a reasonable doubt before they may be considered by you in arriving at your decision. Proof of an aggravating circumstance beyond a reasonable doubt is evidence by which the understanding, judgment and reason of the Jury are well satisfied and convinced to the extent of having a full, firm and abiding conviction that the circumstance has been proved to the exclusion of and beyond a reasonable doubt.

Evidence tending to establish an aggravating circumstance which does not convince you beyond a reasonable doubt of the existence of such circumstance at the time of the offense should be wholly disregarded.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed.

The sentence which you recommend to the Court must be based upon the facts as you find them from the evidence and the law given to you by this Court. Your verdict must be based upon your finding of whether sufficient aggravating circumstances exist and whether sufficient mitigating circumstances exist which

outweigh any aggravating circumstances found to exist.

In determining whether to recommend life imprisonment or death, the procedure you are to follow is not a mere counting process of "x" number of aggravating circumstances and "y" number of mitigating circumstances, but rather you are to exercise a reasoned judgment as to what factual situations require the imposition of death and which situations can be satisfied by life imprisonment in light of the totality of the circumstances present.

Based on these considerations, you should advise the Court whether the Defendant should be sentenced to life imprisonment or to death.

In these proceedings, it is not necessary that the verdict of the Jury be unanimous but a verdict may be rendered upon the finding of a majority of the Jury.

The fact that the determination of whether or not a majority of you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment upon the sole issue which is submitted to you at this time: Whether a majority of your number recommend that the Defendant be sentenced to death or to life imprisonment.

Should a majority of the Jury determine that the Defendant should be sentenced to death, you should recommend an advisory sentence as follows: "A majority of the Jury advise and recommend to the Court that it impose the death

penalty upon the Defendant, Aubrey Dennis Adams, Jr."

On the other hand, if , after considering all the law and the evidence touching upon the issue of punishment, a majority of the Jury determine that the Defendant should not be sentenced to death, then you should render an advisory sentence as follows: "A majority of the Jury advise and recommend to the Court that it impose a sentence of life imprisonment upon the Defendant, Aubrey Dennis Adams, Jr."

The law requires that seven or more members of the Jury agree upon any recommendation advising either the death penalty or life imprisonment. You will now retire to consider your recommendation, and when seven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your

foreman and returned into Court.

* * *

ADVISORY SENTENCING RECOMMENDATION

[1492-1493]

THE CLERK: Advisory sentence. A majority of the Jury advise and recommend to the Court that it impose the death penalty upon the Defendant, Aubrey Dennis Adams, Jr. Dated this 27th day of October, 1978. George H. Long, Foreman.

THE COURT: You may be seated.
(Thereupon the Defendant resumed his seat).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-3207

AUBREY DENNIS ADAMS, JR.,
Petitioner-Appellant,

versus

RICHARD L. DUGGER,
ROBERT A. BUTTERWORTH,
Respondents-Appellees.

- - - - -
Appeal from the United States District
Court for the Middle District of Florida
- - - - -

ON SUGGESTION FOR REHEARING EN BANC
FILED JUNE 10, 1987

(Opinion November 13, 11 Cir.,
1986 __F.2d__)

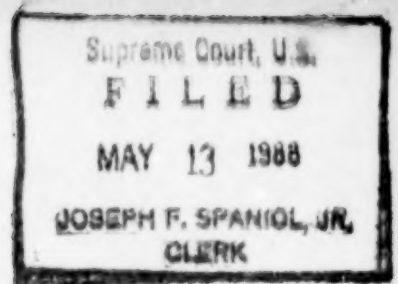
Before RONEY, Chief Judge, FAY and
JOHNSON, Circuit Judges.

PER CURIAM:

No member of this panel nor other
Judge in regular active service on the
Court having requested that the Court be
polled on rehearing en banc (Rule 35,
Federal Rules of Appellate Procedure;

Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

[JURAT OMITTED IN PRINTING]



No. 87-121

IN THE

Supreme Court of the United States

October Term, 1987

RICHARD L. DUGGER, et al., Petitioners,

v.

AUBREY DENNIS ADAMS, Jr., Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Does this Court's holding in Caldwell v. Mississippi, 472 U.S. 320 (1985), which forbids the suggestion to a capital sentencing jury that responsibility for determining the appropriateness of a death sentence rests with the reviewing court, apply to the Florida advisory jury system where the trial judge makes the final sentencing decision?

2. Can a claim premised on Caldwell v. Mississippi, be considered on federal habeas upon a finding of "novelty" when the claim was not presented in the first habeas petition and the state courts have refused to consider the claim, which was not raised at trial, on direct appeal or in the first collateral attack in state court?



LIST OF PARTIES

The petitioners are Richard L. Dugger, Secretary, Department of Corrections, and Robert A. Butterworth, Attorney General of the State of Florida. The respondent is Aubrey Dennis Adams, Jr.

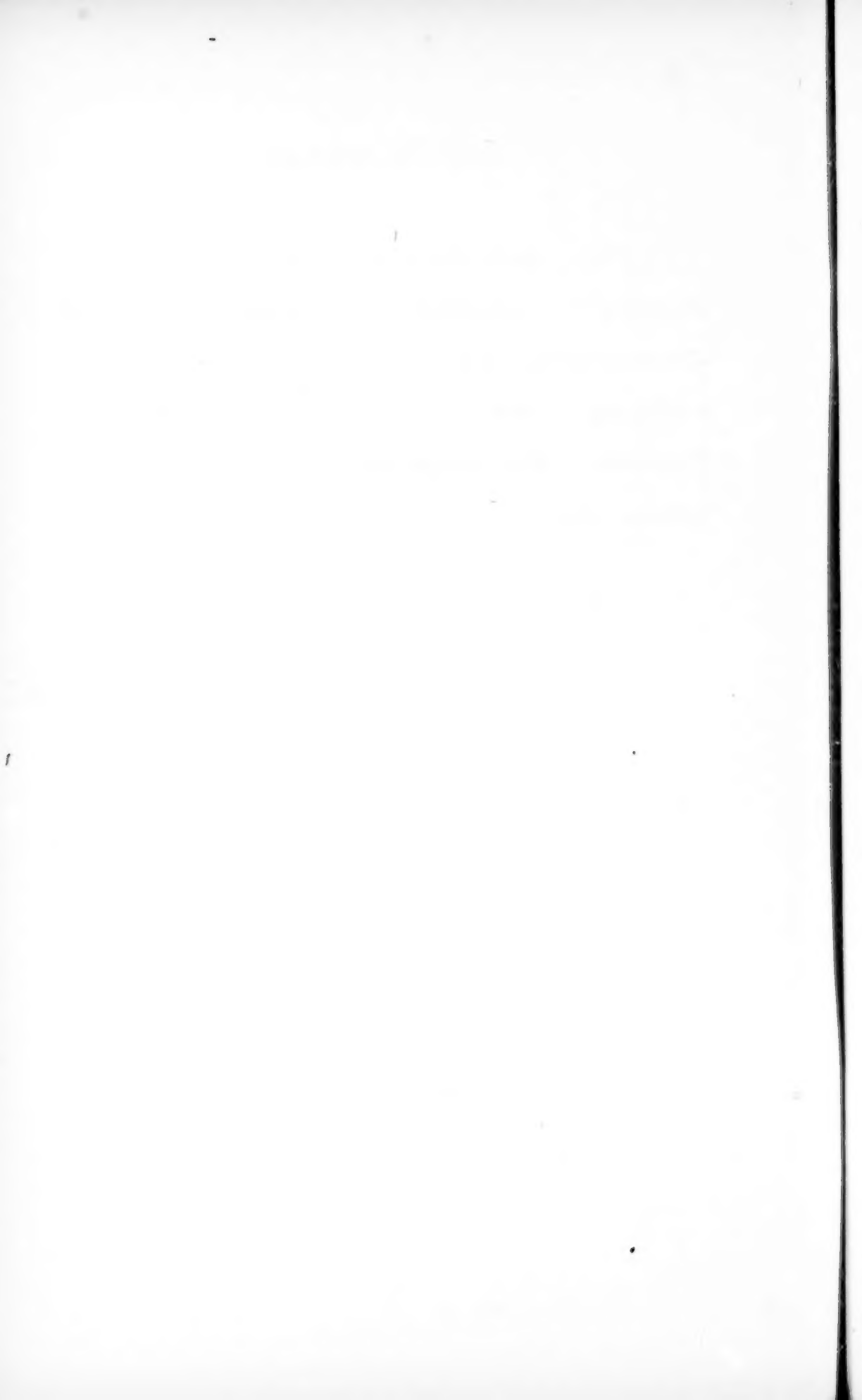


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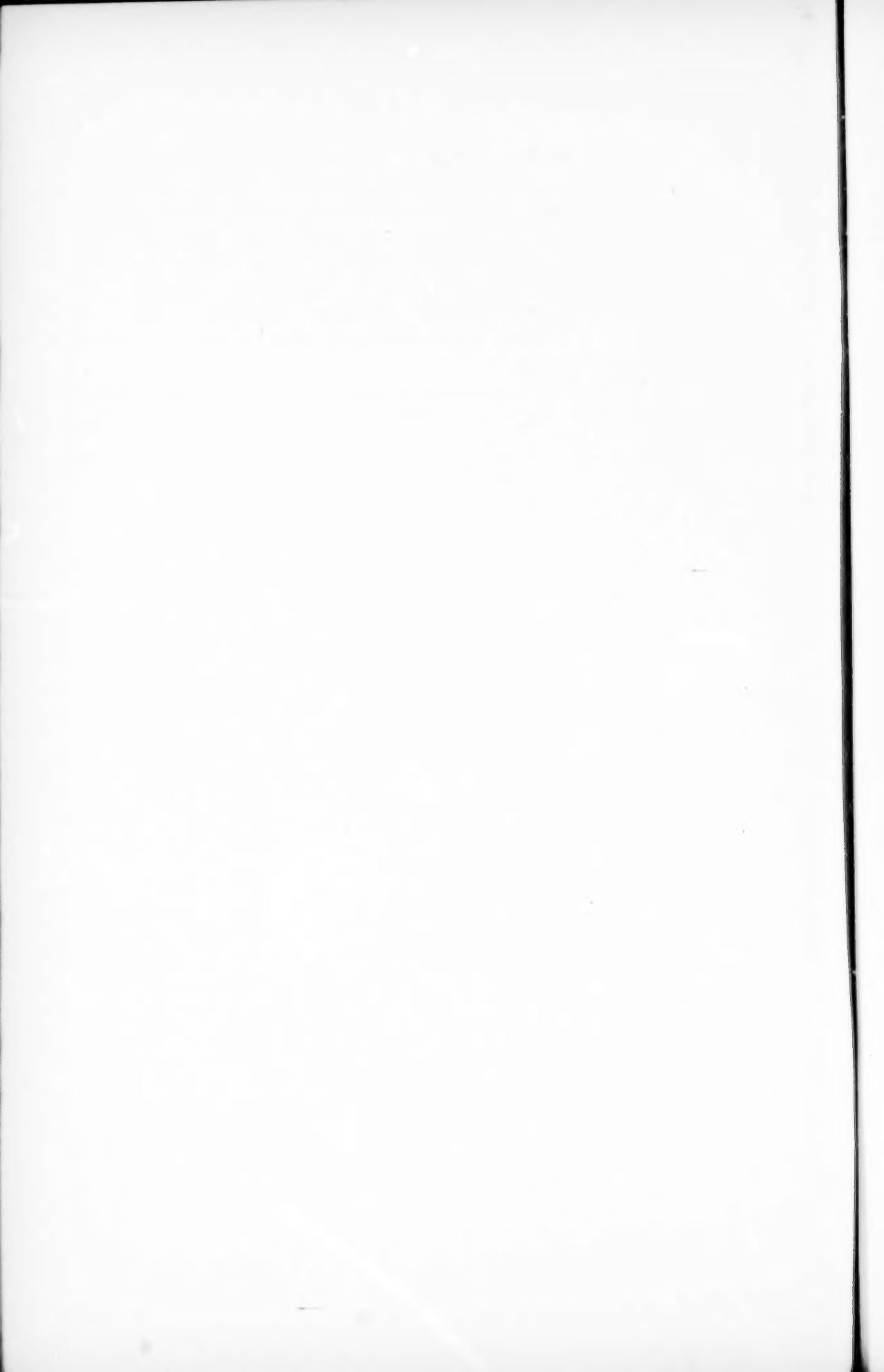


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October Term, 1987

RICHARD L. DUGGER, et al., Petitioners,

v.

AUBREY DENNIS ADAMS, Jr., Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. p. 1a) is reported at 804 F.2d 1526. The opinion of the court of appeals on petition for rehearing (Pet. App. p. 78a) is reported at 816 F.2d 1493. The opinion of the district court (Pet. App. p. 43a) is not reported.

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was entered on November 13, 1986 (Pet. App. p. 1a). A petition for rehearing was denied on April 23, 1987 (Pet. App. p. 78a). A suggestion for rehearing en banc was denied on June 10, 1987 (J.A. 96). Mandate has been stayed during the pendency of this proceeding. The petition for a writ of certiorari was filed on July 20, 1987 and was granted on March 7, 1988. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATEMENT

Aubrey Dennis Adams, Jr. was convicted in October 1978 of the first degree murder of eight-year-old Trisa Gail Thornley. Following the jury's recommendation, the trial judge imposed the

death sentence in January 1979.¹ (Pet. App. p. 1a).

At the beginning of jury selection for Adams' trial, the judge, who is the sentencer, in an explanation of Florida's bifurcated procedure, discussed the nature and effect of the jury's recommended sentence in a capital murder trial with the initial panel of prospective jurors. He informed them of the advisory nature of their sentencing recommendation, the fact that he could disregard it and sentence Adams to life or death, and that the decision is on his conscience (J.A. 15-20). He gave a substantially similar explanation of the jury's role each time new prospective jurors were seated (J.A.

¹ The particular facts of the crime, though not relevant to this proceeding at this time, can be found in more detail in *Adams v. State*, 412 So.2d 850 (Fla. 1982) and *Adams v. Wainwright*, 764 F.2d 1356 (11th Cir. 1985).

20-79). Each time this explanation was given, however, it was accompanied by an explanation that the jury's advisory sentencing verdict was to be based on the finding and weighing of aggravating and mitigating factors (J.A. 18-19; 26-27; 32-33; 38; 44-45; 51-52; 59-60; 67-68; 75-76). When two prospective jurors indicated that their opposition to the death penalty would keep them from recommending a death sentence, he probed the strength of their convictions, without objection, in terms of whether they could not "vote for a recommendation to the Judge for a death penalty, even though the Judge is not bound to follow it." (Pet. App. p. 40a).

During the penalty phase the jury was properly instructed under Florida law as to the fact that its sentencing recommendation is only advisory and that "the final decision as to what punishment

shall be imposed rests solely upon the Judge of this Court." (J.A. 85). Fla. Std. Jury Instr. (Crim.) 2.09. The jury was properly instructed as to the finding and weighing of the mitigating and aggravating circumstances and its duty to follow the law in rendering an advisory sentence and that the verdict should be based upon the evidence (J.A. 85-91). It was further instructed not to "act hastily or without due regard to the gravity of these proceedings" and told to "carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake." (J.A. 93).

In final closing argument, the prosecutor acknowledged that the jury's recommendation was advisory and admonished the jurors to be fair and impartial to the defendant and also to the people of the State of Florida and that "any way you people decide will satisfy the State of

Florida." (J.A. 84-85).

No objection to such comments was interposed during voir dire. Defense counsel was satisfied with the formal jury instruction at the penalty phase and never requested an alternate or more comprehensive instruction. The propriety of the judge's remarks was never raised as an issue on direct appeal. Adams collaterally challenged his judgment and sentence in state and federal courts upon the signing of a death warrant, never raising this issue, and all relief was denied. Adams v. State, 456 So.2d 888 (Fla. 1984); Adams v. Wainwright, 764 F.2d 1356 (11th Cir. 1985).

Two days prior to his second scheduled execution, Adams, for the first time, raised the issue that the trial judge's remarks violated the tenets of Caldwell v. Mississippi, 472 U.S. 320 (1985), in a second motion to vacate

judgment and sentence, which was denied by the trial court on March 3, 1986. The Florida Supreme Court affirmed this denial, finding that all newly raised grounds for relief should have been presented on direct appeal or in the first motion to vacate judgment and sentence and were barred from review as an abuse of procedure and by caselaw. Adams v. State, 484 So.2d 1216, 1217 (Fla. 1986). The court expressly and exclusively relied on the bar raised by state procedural barriers and never reached the merits of the claim. This Court denied Adams' petition for writ of certiorari to the Supreme Court of Florida. Adams v. Florida, 106 S.Ct. 1506 (1986).

Adams then filed a second habeas petition on March 5, 1986 (Pet. App. p. 45a). The district court did not reach the merits of the claim, finding the failure to raise it in the first petition

was an abuse of the writ, and that the claim had also been procedurally defaulted upon in the state courts (Pet. App. 57a). Counsel offered as justification for not raising this new claim in the previous petition the novelty of the Caldwell decision (Pet. App. p. 57a). The district court determined that the claim derived no merit from Caldwell because the trial judge, and not the jury, is the sole sentencer in Florida (Pet. App. p. 58-59a). Adams subsequently appealed to the United States Court of Appeals for the Eleventh Circuit.

The Eleventh Circuit Court of Appeals reversed the district court's denial of a writ of habeas corpus with regard to the Caldwell claim and remanded the case to the district court with instructions to issue the writ of habeas corpus if the State of Florida does not afford Adams a new sentencing proceeding before an

untainted jury (Pet. App. p. 34a). The court found the Caldwell decision to be applicable to Florida's sentencing scheme and concluded that the judge's statements to the jury were misleading (Pet. App. p. 7, 16a). The court ignored procedural bars, finding Caldwell to be a significant change in the law so as to excuse the failure to raise the claim in the previous habeas petition and to establish cause to excuse procedural default in state court, as attorneys lacked the tools to raise this eighth amendment claim until the Caldwell decision (Pet. App. p.80-81; 104-105a). The court found, as well, that Adams was prejudiced by the failure to raise the claim (Pet. App. p. 108a).

SUMMARY OF ARGUMENT

1. At the time Aubrey Dennis Adams, Jr. filed his first habeas petition in September, 1984, there was a considerable body of state and federal law indicating

that a capital sentencing jury's sense of responsibility for sentencing cannot be diminished. All that is required under Engle v. Isaac, 456 U.S. 107, 133-134 (1982) is that the basis of a constitutional claim be available, not that it be spelled out in any particular constitutional terms. The state of the law in 1984 provided ample thread from which to weave the eighth amendment claim recognized in Caldwell v. Mississippi, 472 U.S. 320 (1985), so that the failure to do so must necessarily be attributable to inexcusable neglect or deliberate withholding. Consideration of the merits of such claim should have been precluded by the application of the abuse of the writ doctrine.

2. From the time of trial in 1976 to collateral attack in state court in 1984, eighth amendment jurisprudence had sufficiently evolved to allow for the

fashioning of this claim. Caldwell has not been held to have retroactive application. The Caldwell decision did not overrule one of this Court's precedents or disapprove a practice this Court has arguably sanctioned. Such argument has been uniformly condemned even pre-Furman by legal authorities. Under such circumstances, the finding that the novelty of the claim excuses earlier presentation of it must necessarily rest upon a misapplication of Reed v. Ross, 468 U.S. 1 (1984).

3. Under Florida procedure, the trial judge imposes sentence and the jury merely renders an advisory recommendation as to whether it believes a capital defendant should receive a sentence of life imprisonment or death. In Mississippi the jury is the sentencer. Statements correctly informing the jury of its advisory role do not support a claim

based on Caldwell v. Mississippi. Even if a jury could be found not to have taken its advisory role seriously, there are no eighth amendment Caldwell-type implications under Florida's tripartite sentencing scheme in which jury misadvice can never evolve into an actual sentence.

ARGUMENT

I

THE ABUSE OF THE WRIT DOCTRINE PRECLUDED CONSIDERATION OF THE MERITS OF RESPONDENT'S HABEAS CORPUS CLAIM THAT THE JURY'S SENSE OF RESPONSIBILITY FOR SENTENCING WAS DIMINISHED AS THE FAILURE TO RAISE THE CLAIM EARLIER WAS DUE TO INEXCUSABLE NEGLIGENCE OR DELIBERATE WITHHOLDING.

Unlike the situation in Caldwell v. Mississippi, 472 U.S. 320 (1985)², this

² In Caldwell v. Mississippi, 472 U.S. 320 (1985), this Court was considering the application of the Mississippi death penalty procedure. Under the Mississippi procedure, the jury makes the final determination of whether to impose the sentence of life or death. That sentence cannot be overridden by the trial judge and is subject to review only by the Supreme Court of Mississippi. In Caldwell, the prosecutor, in his final argument, commented: "Now, they would have you believe that you're going to kill this man and they know - they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it." 472 U.S. at 325.

In explaining the Mississippi procedure, this Court quoted with approval from one of the dissenting opinions which stated: "The [mercy] plea is made directly to the jury as only they may impose the death sentence. Under our standards of appellate review mercy is irrelevant." Id. at

case comes before the Court after federal review on the merits in the face of a finding of abuse of the writ because respondent failed to raise a Caldwell claim in the first petition for writ of habeas corpus. (Pet. App. p. 57a). Counsel offered as justification for not raising the claim in the previous petition the novelty of the decision in Caldwell. (Pet. App. p. 57a).

The Court of Appeals for the Eleventh Circuit held that the district court abused its discretion in finding abuse of the writ as there was no evidence that the failure to raise the claim in the earlier

331. This Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-329. The present case differs from Caldwell in several crucial respects.

petition was the result of inexcusable neglect or deliberate withholding, as the Caldwell decision was not available to respondent at the time he filed his first petition in September 1984 (Pet. App. p. 80a).

The lower court further found that the eighth amendment argument was not one of which the respondent should have been aware at the time of filing his first petition, as the claim is not one which had been raised and considered in a number of other cases at the time of that petition and the precedents of this Court at that time did not make it evident that such statements by the trial judge implicated the Eighth Amendment. The court found that precedent, specifically this Court's decision in California v. Ramos, 463 U.S. 992 (1983), indicated that the contrary was true (Pet. App. p. 82a). Although the court noted that

statements regarding appellate review such as those involved in Caldwell had been held to be reversible error as a matter of state law by a number of states, it reasoned that the mere fact a practice may be condemned as a matter of state law does not indicate that the same practice constitutes an eighth amendment violation (Pet. App. p. 86a).

At issue preliminarily is whether the decision in Caldwell is so novel as to preclude application of the abuse of the writ doctrine or whether the claim was available so that the failure to present the claim in the first petition was necessarily attributable to inexcusable neglect or deliberate withholding.

It is clear that a successive petition for habeas corpus that raises claims which could and should have been raised in a prior habeas corpus petition constitutes an abuse of the writ. Woodard

v. Hutchins, 464 U.S. 377 (1984). A district court need not consider a claim raised for the first time in a second habeas petition unless the petitioner establishes that the failure to raise the claim earlier was not the result of intentional abandonment or withholding or inexcusable neglect. Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts.

To the extent that second and successive federal habeas corpus petitions involve the danger that a condemned inmate might attempt to use repeated petitions and appeals as a mere delaying tactic, the state has quite a legitimate interest in preventing such abuses of the writ. Barefoot v. Estelle, 463 U.S. 880, 895 (1983). It is only the rare case in which the prisoner supplements his constitutional claim with a colorable showing of factual innocence that the ends

of justice require federal courts to entertain successive habeas corpus petitions. Kuhlmann v. Wilson, 106 S.Ct. 2616, 2627 (1986). This is so even though "the concept of 'actual' as distinct from 'legal' innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense." Smith v. Murray, 106 S.Ct. 2661, 2668 (1986).

Under established doctrine the district court was correct in concluding that respondent had, indeed, abused the writ. Claims must be included in a prior petition if a competent attorney should have been aware of the claims at the time of the prior petition. Jones v. Estelle, 722 F.2d 159, 169 (5th Cir. 1983) (en banc). The trial lawyer in this case had the responsibility to raise this claim and could have. In Caldwell this Court indicated that the claim was not a novel

one and recounted the long history of the claim and noted uniform condemnation of such argument by legal authorities and state courts even prior to Furman v. Georgia. Caldwell v. Mississippi, *supra*, 105 S. Ct. at 2642. Indeed, the Florida case of Blackwell v. State, 76 Fla. 124, 79 So. 731, 735-736 (1918), virtually mirrors this Court's decision in Caldwell.³ See also, Pait v. State, 112 So.2d 380, 383-384 (Fla. 1959). At the time of respondent's first habeas petition the Eleventh Circuit Court of Appeals had considered the argument that prosecutorial and judicial comment on the appellate process rendered a petitioner's trial fundamentally unfair in violation of the due process clause of the Fourteenth

³ The Mississippi Supreme Court decision in Caldwell was available, as well, at the time of the first habeas petition, framing such arguments in an eighth amendment context. 443 So.2d 806 (1983).

Amendment. E.g., Corn v. Zant, 708 F.2d 549, 557 (11th Cir. 1983); McCorquodale v. Balkcom, 705 F.2d 1553, 1556 (11th Cir. 1983).

Justice Stevens also articulated similar concerns in a concurring opinion in 1983 in Maggio v. Williams, 464 U.S. 46 (1983):

In my opinion, the argument was prejudicial to the accused, both because it appears to have misstated the law and because it may have led the jury to discount its grave responsibility in determining the defendant's fate. A prosecutor should never invite a jury to err because the error may be corrected on appeal. That is especially true when the death penalty is at stake.

464 U.S. at 55.

It must be stressed that all that need be available is the **basis** of a constitutional claim.⁴ See, Engle v. Isaac, 456 U.S.

⁴ "The entire thrust of the 'new law' exception to the abuse of the writ doctrine is to

107, 133-134 (1982). A habeas petitioner need not wait for subsequent acceptance of an argument. See, Smith v. Murray, 106 S.Ct. 2661, 2666 (1986).

It is clear that had respondent, on the basis of readily available case precedent, fashioned this claim, federal courts would have appropriately considered it on the merits without the need to recite book and verse of the Constitution. See, Anderson v. Harless, 459 U.S. 4 (1982); Picard v. Connor, 404 U.S. 270 (1971).

The state and federal court rulings cited above are also significant because they evince other defendants' recognition prior to Caldwell v. Mississippi, that a

excuse claims based on 'unanticipated' changes in the law, not to allow a petitioner to sit back and ignore his nascent claims until a majority of the Supreme Court announces a favorable decision." Moore v. Kemp, 824 F.2d 847, 872 n. 31 (11th Cir. 1987), cert. granted, 43 Cr.L. 4013 (April 18, 1988).

capital jury's sense of responsibility for imposition of the death sentence cannot be diminished. Adams, therefore, had ample thread from which to weave the eighth amendment claim recognized in Caldwell when he first sought federal habeas relief in September 1984. The failure to present the claim in the first petition can only be attributed to inexcusable neglect or deliberate withholding. "In sum, if a petitioner fails to prosecute a claim when its factual and legal bases are present, two inferences are permissible: either he is deliberately withholding the claim, perhaps with the idea of asserting it in a subsequent petition, or he is simply neglecting to pursue it." Moore v. Kemp, 824 F.2d 847, 863 (11th Cir. 1987), cert. granted, 43 Cr.L. 4013 (April 18, 1988). (TJOFLAT, Circuit Judge, concurring in part and dissenting in part, in which VANCE, Circuit Judge, joins).

The court of appeals has managed to avoid such a finding in this case by ignoring the doctrine of abuse of the writ. The court refused to find a third layer of state procedural default in this case and focused, therefore, only on the state of the law at the time of trial and appeal and applied Reed v. Ross, 468 U.S. 1 (1984), to reach the merits of the claim. Respondent, however, is not automatically excused, as well, under the abuse of the writ doctrine from pressing this claim in his first petition for writ of habeas corpus. The state of the law at the time respondent filed his first habeas petition in 1984 should have been more fully considered by the court below.

Contrary to the finding of the lower court, this Court's opinion in California v. Ramos, 463 U.S. 992 (1983), did not indicate that such statements by a trial judge had no eighth amendment

implications. Ramos required this Court to consider the constitutionality under the Eighth and Fourteenth Amendments of instructing a capital sentencing jury regarding the Governor's power to commute a sentence of life without possibility of parole. This Court ultimately determined that the Eighth and Fourteenth Amendments did not prohibit such an instruction nor did the failure of such instruction to inform the jury of the Governor's power to commute a death sentence violate the Constitution. 463 U.S. at 1006, 1011.

This Court discussed its earlier Ramos decision in Caldwell and stated "[c]reating this image in the minds of the capital sentencers is not a valid state goal, and Ramos, is not to the contrary. Indeed, Ramos, itself never questioned the indispensability of sentencers who 'appreciat[e]...the gravity of their choice and...the moral responsibility

reposed in them as sentencers." 105 S.Ct. at 2643.

Ramos did nothing to detract from the doctrine set forth in Woodson v. North Carolina, 428 U.S. 280 (1976), that a death sentence must rest upon a consideration of the character and record of the individual defendant and the circumstances of the particular offense and that because of the qualitative difference between death and a sentence of imprisonment there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. 428 U.S. at 394-395.

This Court did not simply distinguish Ramos but clearly indicated that the Mississippi Supreme Court was wrong in interpreting Ramos as sanctioning such statements. A "sanctioning" of this type of statement is simply not apparent from

one lone, incorrect state appellate decision.

An interpretation of Ramos as leaving the decision of whether to inform the jury of extraneous matters with the individual states is not a reasonable interpretation and ignores the simple fact that the instruction in Ramos was correct; the instruction in Caldwell was not. If anything, Caldwell is simply an extension of Ramos and pre-existing eighth amendment jurisprudence.⁵ The decision below must,

⁵ Caldwell, himself, relied upon Ramos, as well as Woodson v. North Carolina, 428 U.S. 280, 304 (1976) and Proffitt v. Florida, 428 U.S. 242, 251-252 (1976) in bringing his case before this Court (Pet. App. 120a). The petitioner in Moore v. Blackburn, 774 F.2d 97, 98 (5th Cir. 1985) found the tools to raise this claim pre-Caldwell, by virtue of the opinions in Ramos, Lockett v. Ohio, 438 U.S. 586, 605 (1978) and Gregg v. Georgia, 428 U.S. 153, 199, 206-207 (1976). (Pet. App. 11a-119a). Indeed, this Court stated in Caldwell, that "...this Court's Eighth Amendment jurisprudence has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the state." 105 S.Ct. at 2640. Such a premise has been made clear in numerous opinions. See, McGautha v. California,

therefore, be reversed.⁶

402 U.S. 183, 208 (1971); *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1978); and *Gardner v. Florida*, 430 U.S. 349 (1977) as well as the cases relied upon by petitioners above. Eighth amendment jurisprudence was certainly sophisticated enough to allow a defendant faced with a jury with a diminished sense of responsibility to fashion this claim.

⁶ Moreover, the ends of justice do not demand consideration of the merits of the claim. Adams has never supplemented his constitutional claim with a colorable showing of factual innocence. He has neither demonstrated the inapplicability of the aggravating factors actually found nor proffered substantial mitigating evidence not fully considered; pointed to any distortion in the weighing process vis-a-vis a proportionality analysis; or demonstrated that the trial judge's responsibility for sentencing was diminished, so as to determine that he was conclusively entitled to a sentence less than death. He has certainly not demonstrated "innocence" in the sense of being innocent of any statutory aggravating circumstance essential to eligibility for the death penalty.

II

THE STATE COURT DECISION RESTED UPON ADEQUATE AND INDEPENDENT STATE GROUNDS AS THE STATE SUPREME COURT ACTUALLY RELIED ON ITS PROCEDURAL BARS FOR ITS DISPOSITION OF THE CASE AND THE MERITS OF THE CLAIM WERE ENTERTAINED ON FEDERAL REVIEW BY VIRTUE OF A MISAPPLICATION OF THIS COURT'S DECISION IN REED V. ROSS, 468 U.S. 1 (1984).

In Caldwell v. Mississippi, 472 U.S. 320 (1985), unlike the present case, the defendant had objected to the Mississippi prosecutor's comment. The subject "Caldwell" claim was not objected to at trial, argued on direct appeal or raised in the first collateral attack in state court. The state applied its procedural default rules and refused to entertain the claim.⁷ See, Adams v. State, 484 So.2d

⁷ Florida's state courts follow their own procedural rules. Sinclair v. Wainwright, 814 F.2d 1516, 1522 (11th Cir. 1987). The Supreme Court of Florida plainly invoked its procedural default rule in regard to this claim. Florida, in

1216 (Fla. 1986).

Although federal courts retain the power to look beyond state procedural forfeitures, the exercise of that power is inappropriate unless the defendant succeeds in showing both "cause" for noncompliance with the state rule and

fact, has never excused a Caldwell, claim from state procedural requirements. See, e.g., *Combs v. State*, 13 F.L.W. 142 (Fla. Feb. 18, 1988); *Grossman v. State*, 13 F.L.W. 127 (Fla. Feb. 18, 1988); *Demps v. State*, 515 So.2d 196 (Fla. 1987); *Card v. Dugger*, 512 So.2d 829 (Fla. 1987); *Blanco v. Wainwright*, 507 So.2d 1377, 1380 (Fla. 1987); *Copeland v. Wainwright*, 505 So.2d 425 (Fla. 1987); *Aldridge v. State*, 503 So.2d 1257 (Fla. 1987); *State v. Sireci*, 502 So.2d 1221, 1224 (Fla. 1987); *Darden v. State*, 475 So.2d 217, 221 (Fla. 1985); *Middleton v. State*, 465 So.2d 1218, 1226 (Fla. 1985). The supreme court's notation that Caldwell is not applicable to Florida's sentencing scheme certainly does not mean that the application of such bar was dependent upon an antecedent ruling as to whether federal constitutional error had been committed. Moreover, unlike the situation in *Ake v. Oklahoma*, 470 U.S. 68 (1985), in Florida, federal constitutional errors are not "fundamental" errors to which Florida's waiver rule would not apply. *Clark v. State*, 363 So.2d 331 (Fla. 1978); *Sanford v. Rubin*, 237 So.2d 134 (Fla. 1970).

"actual prejudice resulting from the alleged constitutional violation." Wainwright v. Sykes, 433 U.S. 72, 84 (1977). "...Concerns for finality and comity are virtually identical regardless of the timing of the defendant's failure to comply with legitimate state rules of procedure." Smith v. Murray, 106 S.Ct. 2661, 2666 (1986). While it is true that when "a constitutional claim is so novel that its legal basis is not reasonably available to counsel" at the time of a petitioner's state court procedural default, the petitioner has cause for the failure to raise the claim in accordance with the state procedural rule pursuant to Reed v. Ross, 468 U.S. 1, 16 (1984), such novelty is premised upon a "lack of tools to construct a constitutional claim." If such tools are available, then the claim is not sufficiently novel to constitute cause for failure to comply with state

procedural rules because "[w]here the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default." Engle v. Isaac, 456 U.S. 107, 133-134 (1982). "[T]he question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all." Smith v. Murray, 106 S.Ct. 2661, 2667 (1986). By the above standards, a finding of cause for Adams' triple procedural default by the Eleventh Circuit was wholly inappropriate.

Perhaps the clearest indicator that such claim was not sufficiently novel to constitute cause for failure to comply with state procedural rules is the fact that the Court which authored the opinions

in Sykes, Murray, Ross, and Engle, would not undertake review in Caldwell, until it assured itself that the state court decision did not rest upon adequate and independent state grounds. Caldwell, supra, 105 S.Ct. at 2638.

As fully argued in Point I, eighth amendment jurisprudence had evolved to the degree that at the time of trial and direct appeal respondent had the necessary tools to fashion this claim. As long ago as the pre-Furman case of McGautha v. California, 402 U.S. 183 (1971), Justice Harlan, writing for the Court, upheld a capital sentencing scheme in spite of its reliance on jury discretion. The sentencing scheme's premise, he assumed, was "that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision." 402 U.S. at 208.

At the time of Adams' first collateral attack in state court in 1984, he had a considerable body of federal law, as well as state law, on which to rely.⁸ Adams also had the benefit of this Court's decision in California v. Ramos, 463 U.S. 992 (1983), which was sufficient, along with pre-existing eighth amendment jurisprudence, for Bobby Caldwell to bring his claim before this Court. He even had the benefit of the state court opinion in Caldwell. It is also clear that at this point in time other defendants had the

⁸ The court of appeals, however, has sidestepped consideration of this third layer of default by construing the opinion of the Florida Supreme Court as barring only those claims that had been considered and ruled upon in the previous motion for post-conviction relief as an abuse of Florida's post-conviction procedure (Pet. App. p. 89a, footnote 3). A fair reading of the opinion of the Florida Supreme Court simply does not support this finding. See, Adams v. State, 484 So.2d 1216, 1217 (Fla. 1986). This is especially so since Florida Rule of Criminal Procedure 3.850 specifically bars successive motions raising new and different grounds as an abuse of procedure.

tools to raise this claim. See, Moore v. Blackburn, 774 F.2d 97 (5th Cir. 1985).

Respondent cannot rely on the novelty of his legal claim as "cause" for noncompliance with Florida's rules just because the subsequent Caldwell decision made counsel's task easier. If this were so, an application of Reed v. Ross would turn each new decision emanating from this Court into cause and prejudice for ignoring an otherwise valid procedural bar. This would be an incongruous result where, as here, various forms of the claim respondent now advances have been percolating in the lower courts for years. Cf., Smith v. Murray, 106 S.Ct. 2661, 2667 (1986).

A finding of novelty in this case so as to establish cause to excuse respondent's procedural default rests upon a misapplication of Reed v. Ross, in which this Court had articulated a constitu-

tional principle that had not been previously recognized but which was held by this Court to have retroactive application. 468 U.S. at 17.

Even under such an analysis a finding of novelty is not warranted. As previously argued, the very language of this Court in Caldwell indicates that such decision did not overrule the decision in Ramos, so as to satisfy the first situation described in Ross, that a decision of this Court explicitly overrule one of its precedents, or the third situation, that the decision disapprove a practice this Court arguably sanctioned in prior cases. 468 U.S. at 17. This Court further noted uniform condemnation of such argument by legal authorities and state courts even prior to Furman v. Georgia. Caldwell, supra, 105 S.Ct. at 2642. Thus, the decision in Caldwell certainly did not "overturn a long standing and widespread practice to

which this Court had not spoken, but which a near-unanimous body of lower court authority had expressly approved." Reed v. Ross, supra, 468 U.S. at 17. The present case simply does not fall within the ambit of Ross, so as to justify a finding of cause for Adams' procedural default.⁹

In an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default. Murray v. Carrier, 106 S.Ct. 2639, 2650 (1986). But, there is nothing "'fundamentally unfair' about enforcing

⁹ The decision below was not based on the issue of retroactivity and the same need not be considered by this Court. The petitioner in no manner concedes that Caldwell should be retroactively applied, however, and suggests that the position taken by the amicus is correct.

procedural default rules in cases devoid of any substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination." Smith v. Murray, 106 S.Ct. 2661, 2668 (1986). Translated into sentencing terms, Adams has never demonstrated his entitlement to a sentence less than death.

A sentence of death should not be disturbed, as the Eleventh Circuit seems to suggest, on the basis that the judge found an equal number of mitigating and aggravating factors (Pet. App. p. 18a). This is especially true in the case of a grisly child-murder, where great weight could be placed upon the aggravating factor that the murder was heinous, atrocious and cruel. The more reasonable approach is that suggested in the dissent in Moore v. Kemp, 824 F.2d 847, 878 (11th Cir. 1987), cert. granted, 43 Cr.L. 4013 (April 18, 1988) in which "innocence" is

interpreted as being innocent of any statutory aggravating circumstance essential to eligibility for the death penalty.

The test enunciated by Wainwright v. Sykes, 433 U.S. 72 (1977) is two-pronged: a habeas petitioner must show both cause and prejudice for his procedural default in state court. Unlike the situation in Ross, prejudice is not here conceded. Reed v. Ross, supra. 468 U.S. at 9. Respondent had the burden below of "showing not merely that the errors created a possibility of prejudice but that they worked to his actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 170 (1982). Such burden has not been met in this case.

Upon finding that the judge's statements to Adams' jury violated the

principles enunciated in Caldwell and that such misstatements were in no way cured during the bifurcated proceeding, the Eleventh Circuit seemed to automatically find that Adams was prejudiced by the failure to raise this claim (Pet. App. p. 108-109a).

It is clear, however, that the effect such comments have on sentencing must be looked to not only in determining the applicability of Caldwell, but in undertaking a rational prejudice analysis. In Darden v. Wainwright, 106 S.Ct. 2464, 2473 n. 15 (1986), this Court indicated that the fact that such comments were made at the **guilt-innocence** stage of trial greatly reduced the chance that they had **any** effect at all on sentencing. In the present case the challenged comments were one further step removed and made during **voir dire**, lessening **still** any chance that they had any effect at all on

sentencing. Such comments, in fact, occurred in the context of a most generalized explanation of Florida's bifurcated procedure. While, no doubt the respondent will point to the frequency of such comments in support of his position, it should be remembered that this later advocate was not the same attorney as at trial, who stood objectionless, and in the course of a trial for a heinous child-murder, had more than a passing interest in having death-scrupled veniremen serve on the jury.¹⁰ "The failure of otherwise competent defense counsel to raise an objection at trial is often a reliable

¹⁰ At this point in time this issue could have been resolved, as well, on the basis of state law based on the 1975 decision in *Tedder v. State*, 322 So.2d 908 (Fla. 1975), which held that the jury's advisory sentencing recommendation must be given great weight. This fact highlights the fallacy of allowing defense attorneys to lie in wait for a decade for federal pronouncements when they had adequate tools to have an issue resolved at the time of trial.

indication that the defendant was not denied fundamental fairness in the state court proceedings. The person best qualified to recognize such error is normally a defendant's own lawyer." Rose v. Lundy, 455 U.S. 509, 547-548 n. 17 (1982) (Stevens, J., dissenting).

To obtain collateral relief from errors in a jury charge the petitioner must show that the ailing instruction by itself so infected the entire trial that the resulting conviction violated due process and that the error worked to his substantial disadvantage. Henderson v. Kibbe, 431 U.S. 145, 154-155 (1977); United States v. Frady, 456 U.S. 152, 168-170 (1982).

The actual instruction given at the penalty phase in this case was not even an ailing one, even by the newly articulated standard of the Eleventh Circuit (J.A. 85). In the recent en banc decision in

Harich v. Wainwright, No. 86-3167, slip op. at 18-19 (11th Cir. April 21, 1988), the Eleventh Circuit concluded, as did the Supreme Court of Florida before it, that emphasizing the "advisory" role of the jury, or the fact that the jury is making a "recommendation" to the judge, does not support a Caldwell claim, as such statements are neither inaccurate nor misleading. See also, Pope v. Wainwright, 496 So.2d 798, 805 (Fla. 1986). Moreover, juror knowledge of its advisory role would seem to militate toward an exercise in leniency. See, Dobbert v. Florida, 432 U.S. 282, 294 n. 7 (1977).

Thus, prejudice has inappropriately been found in this case based on comments made two proceedings removed from those in Caldwell, which could only have resulted in the inclusion of those jurors **least** inclined to have returned a recommendation of death, who were always aware that the

judge could choose to follow their advice and who were told prior to their deliberations that "human life was at stake." (J.A. 93).

III

THIS COURT'S DECISION IN CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985), THAT A CAPITAL SENTENCING JURY MAY NOT BE TOLD THAT ITS DECISION IS SUBJECT TO FURTHER REVIEW DOES NOT APPLY TO THE FLORIDA ADVISORY JURY SYSTEM WHERE THE TRIAL JUDGE MAKES THE FINAL SENTENCING DECISION.

Florida procedure is clearly distinguishable from the Mississippi procedure considered in Caldwell v. Mississippi, 472 U.S. 320 (1985). The Florida procedure does not empower the jury with the final sentencing decision; rather, the trial judge imposes the sentence. A reading of section 921.141, Florida Statutes (1985), explains the respective roles of the jury and the judge. That statute provides in part:

(2) **ADVISORY SENTENCE BY THE JURY** - After hearing all the evidence, the jury shall deliberate and render an **advisory sentence to the court**, based upon the following matters:

(3) **FINDINGS IN SUPPORT OF SENTENCE OF DEATH** - Notwithstanding the recommendation of a majority of the jury, **the court**, after weighing the aggravating and mitigating circumstances, **shall enter a sentence** of life imprisonment or death...

Clearly, under our process, the court is the final decision-maker and the sentencer - not the jury. This Court, in describing the Florida death penalty process, has expressly characterized the jury's role in Florida to be "advisory" in nature. Justice Blackmun, writing for the majority in Spaziano v. Florida, explained our procedure in the following manner:

In Florida, the jury's sentencing recommendation in a capital case is only advisory. The trial court is to conduct its own weighing of the aggravating and mitigating circumstances and, "[n]otwithstanding the recommendation of a majority of the jury," is to enter a sentence of life imprisonment or death; in the latter case, specified written findings are required. Fla. Stat. §921.141(3) (1983).

468 U.S. at 451. See also, Barclay v. Florida, 463 U.S. 939 (1983); Dobbert v. Florida, 432 U.S. 282 (1977); Proffitt v. Florida, 428 U.S. 242 (1986).

The division of authority between the jury and the trial judge under the Florida death penalty statute has been upheld against constitutional challenge in Spaziano v. Florida, 468 U.S. 447 (1984) and Proffitt v. Florida, 428 U.S. 242 (1976).

The Supreme Court of Florida expressly approved in In re Standard Jury Instructions in Criminal Cases, 327 So.2d 6 (Fla. 1976), penalty phase jury instructions which explain to the jury its advisory role under Florida's process. Although the instructions have been modified and amended in 1981, In re Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla.), modified, 431 So.2d 599 (Fla. 1981), and in 1985, The

Florida Bar re Standard Jury Instructions Criminal Cases, 477 So.2d 985 (Fla. 1985), the language has remained the same, and consequently, has been used in virtually every death penalty case in this state since 1976, including the present one. The last paragraph of the instruction, which was also given in this case (J.A. 93), clearly emphasizes the importance of the jury's role:

The fact that the determination of whether you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.

Fla. Std. Jury Instr. (Crim.) (for §921.141, Fla. Stat.)

If Caldwell were applied strictly in

accordance with the decision below, Florida's standard jury instructions, as they have existed since 1976, would necessarily have to be found to violate the dictates of Caldwell, which would result in a resentencing proceeding for virtually every individual sentenced to death in this state since 1976. No justification exists for such a conclusion, and even the Eleventh Circuit seems to have subsequently retreated from such a hardline approach in the recent case of Harich v. Wainwright, No. 86-3167 (11th Cir. April 21, 1988).

One concern expressed in Caldwell was that a **sentencing** jury, "unconvinced that death is the appropriate punishment, ...might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts." The jury might thus tend to sentence the defendant to death "because the error may be corrected on

appeal." This Court feared that a defendant might be executed, "although no sentencer had ever made a determination that death was the appropriate sentence." Caldwell, supra, 472 U.S. at 331-332. The appellate court in Caldwell would have had to rely on appellate briefs and transcripts to make a determination of whether death was appropriate. This is not the situation in Florida. Florida's juries play an advisory role in the sentencing process and the trial judge is the sentencer. Combs v. State, 13 F.L.W. 142, 144 (Fla. Feb. 18, 1988). The Florida trial judge, like the jury, hears firsthand all testimony and evidence. See, Harich v. Wainwright, No. 86-3167, Slip op. at 19, n. 13.

In Spaziano v. Florida, 468 U.S. 447, 465 (1984), this Court recognized that the advice of a jury is not the equivalent of a judgment, which is imposed by the

judge. In reaching this result this Court was aware of the decision in Tedder v. State, 322 So.2d 908 (Fla. 1985). 468 U.S. at 466-467. The Supreme Court of Florida recently reaffirmed that the judge is the sentencer and that it had no intention of changing the clear statutory directive that the jury's role is advisory when it held in Tedder that before a judge may override a jury recommendation of life imprisonment, he must find the facts are "so clear and convincing that virtually no reasonable person could differ." The court further indicated that it had approved the jury instructions referred to above after the Tedder decision. Combs v. State, 13 F.L.W. 142, 144 (Fla. Feb. 18, 1988).

In view of the fact that the trial judge is the acknowledged sentencer it is hard to see how Caldwell could have any applicability to Florida, as opposed to

Mississippi, where the jury is the sentencer. There is virtually no **statement** which could diminish the jury's sense of responsibility for sentencing, because the jury is not the sentencer in the first instance.

In particular, statements informing the jury of its advisory role or the fact that it is making a recommendation to the judge do not support a Caldwell claim, as the Eleventh Circuit recently acknowledged. Harich v. Wainwright, No. 86-3167, slip op. at 18-19 (11th Cir. April 21, 1988). Caldwell does not require that an advisory jury be misinformed or tricked into believing that it is the actual sentencer. Cf., Spaziano v. Florida, 468 U.S. 447, 456 (1984) (Beck v. Alabama, 447 U.S. 625 (1980) does not require that the jury be tricked into believing that it has a choice of crimes for which to find the defendant guilty, if

in reality there is no choice). Caldwell does not prohibit an accurate statement of the law concerning the advisory nature of the jury recommendation. Justice O'Connor's separate opinion on which the Caldwell decision rests made clear that there was no constitutional bar to accurately instructing a sentencing jury on the law. 472 U.S. at 341. Clearly, there also can be no bar to accurately instructing a non-sentencing jury of its advisory role.

Both state and federal courts are now in agreement that in Florida the judge is the true sentencer and the lower federal court has been forced to acknowledge the inapplicability of Caldwell to statements that apprise the jury of its advisory role. The Eleventh Circuit, however, seems to cling tenaciously to the idea that despite the fact that the jury is not the sentencer, it cannot be too vehemently

apprised of this fact, even outside of the penalty proceeding, lest it's advisory recommendation be rendered in an atmosphere of frivolity. There are several problems with such an approach.

If advising the jury of the advisory nature of its role during the **penalty phase** is not improper, it is hard to imagine that extraneous comments in recognition of such fact during **lesser phases** of the bifurcated proceeding could rise in level of importance under Caldwell than the penalty phase instructions. This is contrary to the indications of this Court in Darden v. Wainwright, 106 S.Ct. 2464, 2473 n. 15 (1986). Moreover, the jury either is or is not the sentencer. If it is not, as all courts now agree, then there is no reason why it should be made to feel that the taking of a life by the state should fall directly upon its shoulders. Thus, while the reasoning of

the Eleventh Circuit has limited the application of Caldwell somewhat since the decision below, it still requires that the jury be misled, or at the least, shielded from reality, because of its refusal to recognize the simple inapplicability of Caldwell.

There are even more compelling reasons for recognizing the inapplicability of Caldwell to Florida's capital sentencing scheme. Florida's tripartite sentencing system is uniquely designed to eliminate sentencing distortion to the degree humanly possible. Pursuant to this statute the court makes the final determination, after receiving the advice of the jury, and may only impose death after making a written finding that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. It is the judge who must justify the sentence in his

written findings. Fla. Stat. §921.141 (1985). It is the finding and weighing of the circumstances which justifies the imposition of the death penalty; it is also the means by which the sentencing judge and the Florida Supreme Court could determine that a jury's **recommendation** was, in fact, not distorted.

The Florida Supreme Court found in this case that the jury and judge acted with procedural rectitude in applying the statute and that the aggravating and mitigating circumstances **were** supported by the evidence. Adams v. State, 412 So.2d 850 (Fla. 1982). This Court has indicated that it is not the function of a federal court to decide whether it agrees with the majority of the advisory jury or with the trial judge and the Florida Supreme Court when, **regardless of the jury's recommendation**, there is an independent review of the evidence by the trial judge

and there is no evidence that the Florida Supreme Court has failed in its responsibility to perform meaningful appellate review of each death sentence in cases in which both the jury and the trial court have concluded that death is the appropriate remedy. Spaziano v. Florida, 468 U.S. 447, 467 (1984).

Chief Justice Rehnquist, dissenting, in Caldwell, felt that vacation of the death sentence was not warranted, even under the Mississippi system where the jury is the sentencer, simply because a procedure by which it was imposed was in some way flawed where the sentencer's discretion was suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. 105 S.Ct. at 2649. This reasoning has been controlling in the context of Florida's "tripartite" sentencing scheme. See, Wainwright v. Goode, 464 U.S. 78

(1983), Barclay v. Florida, 463 U.S. 939
(1983), see also, Zant v. Stephens, 462
U.S. 862 (1983).

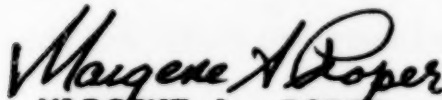
Thus, the willingness of the court below to find eighth amendment implications and constitutional error is in stark contrast to prior decisions of this Court. Florida's procedure, unlike Mississippi's simply precludes any possible misadvice of a jury from ever evolving into an actual sentence.

CONCLUSION

The decision of the Eleventh Circuit Court of Appeals should be reversed and the petition for writ of habeas corpus denied.

Dated: May, 1988

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Margene A. Roper". The signature is written in a cursive, flowing style with a large initial "M".

MARGENE A. ROPER
ASSISTANT ATTORNEY GENERAL



9
No. 87-121

Supreme Court, U.S.

FILED

JUL 1 1988

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD L. DUGGER, et al.,

Petitioners,

vs.

AUBREY DENNIS ADAMS, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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THE QUESTIONS PRESENTED FOR REVIEW

1. Did the trial judge's false denigration of the jury's sentencing role, by emphatically and repeatedly stating that the capital sentencing decision was in no way the jury's responsibility and did not rest on its conscience or shoulders, violate Mr. Adams' Eighth Amendment right to a decision-maker whose responsibility for his capital sentence was not undermined?
2. Is Mr. Adams' Eighth Amendment claim procedurally barred, in view of (a) the absence of an independent and adequate state procedural ground barring it, (b) the existence of "cause" and "prejudice" based upon the supervening decision in Caldwell v. Mississippi, 472 U.S. 320 (1985), or (c) the interests of justice, inasmuch as the claim involves the perversion of the jury's

deliberations on the ultimate penalty issue?

3. Should this Court address petitioners' submission of abuse of the writ of habeas corpus, on which certiorari was not sought or granted; if so, can Mr. Adams be held to have abused the writ by not raising in an earlier petition a claim which would have been procedurally barred and whose constitutional basis did not yet exist?

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No. 87-121

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

RICHARD L. DUGGER, et al., Petitioners,
v.

AUBREY DENNIS ADAMS, Jr., Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

COUNTER-STATEMENT OF THE CASE

A. Trial Proceedings

Respondent Aubrey Dennis Adams,
Jr., who was twenty years old, had no

criminal record, and had been working as a correctional officer, was put on trial in October 1978 for the first-degree murder of Trisa Gail Thornley. The prosecution sought imposition of the death penalty.

During jury selection, the procedure followed was to question prospective jurors in groups. Those prospective jurors from a particular group who were not challenged remained in the courtroom while each successive group of prospective jurors was questioned. Indeed, on at least one occasion when a new question arose, it was posed to prospective jurors whose group had been questioned earlier. (See J.A. 5-8.)

The trial judge had intended to explain once, in front of the entire venire, the two phases of the trial and the jury's role in each phase, but he forgot to do so. (See J.A. 15.) As a result, he

instructed the prospective jurors no less than nine separate times that the jury had no responsibility whatsoever for the sentencing decision, that the decision whether to impose the death penalty was not on the jurors' consciences and did not rest on their shoulders, and that the judge, on whose conscience he said the decision solely rested, was free to disregard the jury's sentencing recommendation. (See J.A. 19, 27-28, 34-35, 40-41, 47-48, 53-55, 61-63, 69-71, 77-79.) Moreover, the judge took it upon himself during Witherspoon questioning to stress that "They don't vote a death verdict" (J.A. 21), to say, "You heard the Court explain to you, did you not, that it is not you who will impose the death penalty?" (J.A. 71), and to ask whether jurors "could not vote for a recommendation to the Judge for a death penalty, even though the Judge is not

bound to follow it." (See Adams v. Wainwright, 804 F.2d 1526, 1533 n.8 (11th Cir. 1986) (quoting p. 369 of trial transcript)).

Four members of the jury in Mr. Adams' case -- Mrs. Wright, Mr. Anderson, Mr. Hull and Mr. Long (see J.A. 5-6, 13-15) -- were present during all eleven of these instructions. Three more jurors -- Mr. Broomfield, Mrs. Hart and Mrs. Clark (see J.A. 6, 13-15) -- were present the last nine times. An eighth juror, Mr. Henson (see J.A. 8, 13-15), was present the last six times. A ninth juror, Mr. Rayburn (see J.A. 9, 13-15), was present the last five times. The other three jurors -- Miss Locke, Mr. Bronson and Mr. Brown (see J.A. 9-10, 13-15) -- were present the last four times. Indeed, the judge gave these (and other) explanations so many times in front of the same jurors

that at one point he asked those who had already heard the explanations to bear with him. (See J.A. 41.)

During these repeated explanations, the judge stressed that it was vital for the jurors to understand their lack of responsibility for the sentencing decision. For example, he stated (J.A. 34-35):

"One thing is very, very important. That is only a recommendation to the Judge. It is not upon your conscience whether this man goes to the electric chair or not but it's solely upon the Judge's conscience. Even if you came back and recommended death, the Court has the right and the power to say, I disregard your recommendation and give the man life imprisonment. If you come back and say the man should not be put to death and I disagree with that, the Court has the power to say, I disregard your recommendation of life and put him to death. The ultimate responsibility of whether this man shall be put to death or not put to death is on the Court's shoulder and upon the Court's conscience and is not upon your conscience."

These instructions misstated the actual significance of the jury's recommendation under Florida law. Contrary to Pet. Br. 3, the judge could not disregard the jury's recommendation. Rather (as discussed in more detail on pages 27-35, infra), the judge was required to give the jury's recommendation great weight and was required to follow it unless "virtually no reasonable person" would agree with the recommendation. See, e.g., Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); LeDuc v. State, 365 So. 2d 149, 151 (Fla. 1978), cert. denied, 444 U.S. 885 (1979). "Juries are the conscience of our communities," McCaskill v. State, 344 So. 2d 1276, 1280 (Fla. 1977); accord Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988); "a jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community, and should

not be overruled unless no reasonable basis exists for the opinion," Richardson v. State, 437 So. 2d 1091, 1095 (Fla. 1983).

Yet, the judge at Mr. Adams' trial repeatedly emphasized to the jury that the sentencing decision was not on its conscience but solely on his:

"So that this conscience part of it as to whether or not to put the man to death or not, that is not your decision to make. That's only my decision to make and it has to be on my conscience. It cannot be on yours. * * *" (J.A. 19-20, heard by 4 of the 12 jurors.)

* * *

"The Court is not bound to accept your recommendation, so that I do not want you to feel that it is on your conscience to put the man to death. That is not your responsibility but that is the Court's responsibility and it is something that I have to put on my shoulders. * * * You are the sole judge as to whether or not he is guilty or innocent. I am the sole determiner on whether or not the man receives life or is put into the electric chair." (J.A. 27-28, heard by 7 of the 12 jurors.)

* * *

"[T]he most important thing on this is for you to understand that that is a recommendation to the Judge. It is not on your conscience and it's not on your shoulders and it's not your responsibility to decide whether or not this man will be put to death. That's on the Court's shoulders and it's the Court's responsibility." (J.A. 47, heard by 8 of the 12 jurors.)

* * *

"It should not be on your conscience nor is it on your shoulders whether or not this man will be put to death or not. That is the Court's sole responsibility and not the Jurors' in any manner whatsoever. * * * The Court is not trying to shuttle this obligation off to the jury at all, and I don't want you to feel that you determine whether or not this man lives or dies because you don't. * * * (J.A. 54-55, heard by 9 of the 12 jurors.)

* * *

"Now the most important thing to remember in Phase Two is that the second vote that you take is exactly what it is, a recommendation to the Judge. The Judge is not bound to follow that recommendation. You will not de-

cide whether or not this man will be put to death or not put to death. That is the Judge's decision and I am the only one that will make that decision, * * * but you should not feel on your conscience or that it's on your shoulders whether or not this man is going to be put to death or not because that is not your decision. * * * So the responsibility and the conscience it has to bear upon as to whether or not this man is going to be put to death or not is not yours; it's mine. * * * [I]t should not be on your conscience nor is it your responsibility. That's the Court's responsibility." (J.A. 69-71, heard by all 12 jurors.)

* * *

"The most important thing, I think, for a Juror to remember is in reference to the recommendation. It is merely that, exactly what it says. It's a recommendation to the Judge. The Judge is not bound to follow that recommendation. You may come back and recommend that I order that the man be put to death. The Judge has the obligation and the duty to say, I disagree with the recommendation; I order the man to be sentenced to life imprisonment, or, you can come back and say, we recommend that the man should be put into prison for life and not

be given death. The Judge has the obligation and the duty to say, I disregard that; I feel that the man should be put to death, and I can order him to be put to death. So the conscience that must bear whether or not the man should be put to death or not is not your conscience; it's the Court's conscience. It's on my shoulders and it's my responsibility to do that. It is not on your shoulders nor on your conscience. You cannot order this man put to death or not put to death. That's not your job. Your recommendation to the Judge is one of the tools that the Judge uses to try to make up his mind. It's not the only tool, by any stretch of the imagination. So that it is strictly a recommendation and nothing more." (J.A. 77-79, heard by all 12 jurors.)

During his guilt phase instructions, the judge again told the jury that if there were a sentencing phase, he could "reject" the jury's recommendation. (See J.A. 80-81.) At the outset of the sentencing phase, he reminded the jury that he had previously told them about the second phase of the trial, and he repeated that

"the final decision as to what punishment shall be imposed rests solely upon the Judge of this Court." (See J.A. 82.)

During closing argument, the prosecutor told the jurors that "the opinion of yours is advisory." (See J.A. 84.) Neither he nor defense counsel stressed the vital importance of the jury's recommendation. The judge's sentencing phase instructions referred back to his prior explanations of the jury's role, stating "As you have been told, the final decision as to what punishment should be imposed is the responsibility of the judge." (See J.A. 85.)

A majority of the jury recommended the death penalty. (J.A. 95.) The trial judge followed that recommendation, although he found an equal number of aggravating and mitigating circumstances, the latter being (1) that Mr. Adams had no

significant history of prior criminal activity; (2) that Mr. Adams was under the influence of extreme emotional disturbance at the time of the offense; and (3) that Mr. Adams was only 20 years old at the time of the offense. See Adams v. State, 412 So. 2d 850, 857 (Fla. 1982) (Boyd, J., dissenting), cert. denied, 459 U.S. 882 (1982).

B. Proceedings Following The Trial

Mr. Adams appealed his conviction and sentence to the Florida Supreme Court in 1979. The conviction was unanimously affirmed, but two justices dissented from the affirmance of the sentence, on the ground that it was excessive on the facts. See Adams v. State, 412 So. 2d at 857 (Fla. 1982) (Boyd, J., dissenting) (death sentence must be reduced to life in view of the dispositions of "prior similar crimes of violence"); Adams v. State, 456

So. 2d 888, 891 (Fla. 1984) (McDonald, J., dissenting) (explaining that Justice McDonald had also dissented on direct appeal because Mr. Adams' death penalty was improper and disproportionate). If one more justice had concluded that the death sentence should not be affirmed, it would have been reversed. Vasil v. State, 374 So. 2d 465, 471 (Fla. 1979), cert. denied, 446 U.S. 967 (1980).

On August 21, 1984, the Governor denied clemency and signed a death warrant scheduling Mr. Adams' execution for September 19, 1984. Since Mr. Adams had no lawyer, the chairperson of the Florida Bar's Special Committee on the Representation of Death-Sentenced Inmates in Collateral Proceedings contacted the law firm of Ausley, McMullen, McGehee, Carothers and Proctor on August 23, 1984, asking it to represent Mr. Adams. Although the firm

had no experience in capital cases, it agreed on August 27, 1984 to represent Mr. Adams, after determining that no other counsel was available. No assistance was available from attorneys with substantial experience in post-conviction representation of death row inmates. On September 5, 1984, the Ausley firm filed an application for a stay and a motion to vacate judgment and sentence pursuant to Fla. R. Crim. P. 3.850. After losing in the trial court on September 7, 1984 and in the Florida Supreme Court on September 11, 1984, Mr. Adams' inexperienced volunteer counsel filed a federal habeas corpus petition on September 14, 1984. After argument on September 17, it was dismissed on September 18, 1984. (See Petitioner's Appendix U in the Court of Appeals.) The Eleventh Circuit, after entering a stay of execution, affirmed. Adams v. Wainwright,

764 F.2d 1356 (11th Cir. 1985), cert. denied, 106 S. Ct. 834 (1986).

On March 2, 1986, shortly after certiorari was denied, Mr. Adams filed a second Rule 3.850 motion, raising for the first time an Eighth Amendment claim based on this Court's decision in Caldwell v. Mississippi, 472 U.S. 320, which had been handed down on June 11, 1985. This was denied by the trial court, and Mr. Adams unsuccessfully appealed to the Florida Supreme Court, which held that the Caldwell claim (together with other claims not previously raised) was barred because it had not been raised at the time of the direct appeal in 1979. Adams v. State, 484 So. 2d 1216 (Fla. 1986.)¹

On March 5, 1986, Mr. Adams filed the present habeas corpus proceeding

¹ See pages 56-58, infra, for discussion of Petitioners' erroneous assertion about this decision.

in federal district court. The district judge held that the raising of the Caldwell claim was both an abuse of the writ and procedurally barred, for this reason: that Mr. Adams' "claim does not derive any merit from the Caldwell decision [which] * * * does not apply in the instant case * * *." (See Cert. Pet. App. at 57.)

C. The Decision Below

On appeal, the Eleventh Circuit found that the Caldwell claim was not procedurally barred, both because there was no adequate and independent state ground barring it and because Mr. Adams had shown "cause" and "prejudice." The Court of Appeals discerned no abuse of the writ. Adams v. Wainwright, 816 F.2d 1493 (11th Cir. 1987).

On the merits, it held that "the trial judge's seriously misleading statements" about the jury's responsibility

violated the Eighth Amendment, by creating "an impermissible danger" that the jury abdicated its heavy responsibility for determining in the first instance whether death was the appropriate punishment. Adams v. Wainwright, 804 F.2d 1526, 1533 (11th Cir. 1986). The Court concluded that:

"Because in Adams' case the jury's recommended sentence of either life or death would fall within the wide area of deference established by the Tedder standard, Adams might be executed although no sentencer had ever made a considered determination that death was the appropriate sentence if his sentence were allowed to stand. * * *

Id. (citing Caldwell).

SUMMARY OF ARGUMENT

Mr. Adams' Eighth Amendment rights were clearly violated by the trial judge's numerous emphatic misstatements that the jury had no responsibility for the imposition of the death penalty, that

the capital sentencing decision in no way rested on the jurors' consciences or shoulders, and that he could disregard their sentencing recommendation. A Florida jury's capital sentencing recommendation is not something which the trial judge may in fact disregard. It is supposed to be given great weight, because the jury is "the conscience of the community," and it can be overruled only if virtually no reasonable person would agree with it. Holsworth v. State, 522 So. 2d 348 (Fla. 1988).

The judge's mischaracterizations of the jury's sentencing role undermined the jurors' responsibility for the life-or-death decision in Mr. Adams' case. This violated the Eighth Amendment principle, announced in Caldwell v. Mississippi, 472 U.S. 320 (1985), that the decision-makers in a capital sentencing process

must not be misled about the nature of their responsibility. As Caldwell recognized, the Eighth Amendment's requirement of reliability in capital sentencing cannot be assured where a decisionmaker is misinformed about the significance of its decision.

Mr. Adams was prejudiced by the judge's repeated deprecations of the jury's responsibility for capital sentencing, which were manifestly designed to reassure people with qualms about taking responsibility for a death sentence that they could vote for death in Mr. Adams' case without troubling their consciences, in light of the jury's supposedly unimportant role. This made it more likely that the jurors would vote for the death penalty in Mr. Adams' case, although a jury which properly understood its responsibility could readily have recommended a life

sentence on the basis of several mitigating circumstances. The appeal process was also distorted, because the Florida Supreme Court's majority reviewed the death sentence on the premise that it had been imposed pursuant to the recommendation of a jury which exercised its full responsibility.

There is no basis for applying a procedural bar to Mr. Adams' Eighth Amendment claim here. There was no independent state procedural ground for the Florida Supreme Court's refusal to decide the merits of that claim, since that court does consider claims which are predicated on changes in constitutional law after the direct appeal or which otherwise involve fundamental error. Moreover, Mr. Adams has, in any event, satisfied the cause and prejudice test.

There was "cause" for Mr. Adams' not raising his Eighth Amendment claim on direct appeal in 1979, since the legal basis for the claim was not then "'reasonably available to counsel.'" Amadeo v. Zant, 56 U.S.L.W. 4460, 4463 (U.S., May 31, 1988) (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)). Prior to Caldwell, no court had held that misleading a decisionmaker about its responsibility for a capital sentencing decision violated the Eighth Amendment. Indeed, Dobbert v. Florida, 432 U.S. 282, 294 n.7 (1977), indicated that it was appropriate for jurors to have a diminished view of their role in capital sentencing. The existing state law precedents did not provide the tools for Mr. Adams' Eighth Amendment claim, because state law errors are simply not the same as federal constitutional claims. See, e.g., Barclay v. Florida,

463 U.S. 939, 957-58 (1983) (plurality opinion by Rehnquist, J.).

Mr. Adams has also shown "prejudice." There was "an impermissible danger that the jury's recommended sentence was unreliable and, consequently, that Adams' death sentence was unreliable." Adams v. Wainwright, 816 F.2d 1493, 1501 (11th Cir. 1987).

Moreover, the interests of justice require consideration of Mr. Adams' claim. The judge's misstatements "serve[d] to pervert the jury's deliberations concerning the ultimate question," and thus created a "fundamental miscarriage of justice." See Smith v. Murray, 477 U.S. 527, 538 (1986).

There is no basis here for barring Mr. Adams' claim as an abuse of the writ. Certiorari was not granted on any question concerning abuse of the writ, so

that issue should not be considered. See Arizona v. Hicks, 107 S. Ct. 1149, 1155 (1987). In any event, Mr. Adams cannot have abused the writ, since at the time of his first federal habeas corpus petition, he could not have gotten a ruling on the merits of his Eighth Amendment claim. Prior to Caldwell, he could not have surmounted the procedural bar applied by the Florida courts.

Furthermore, under the pertinent test for abuse of the writ, that utilized in Smith v. Yeager, 393 U.S. 122, 126 (1968), Mr. Adams did not abuse the writ, since his Eighth Amendment claim was of no more than "doubtful existence" prior to Caldwell. Until Caldwell, no court anywhere had recognized such a claim, and this Court's decision in California v. Ramos, 463 U.S. 992, 1011, 1012 n. 27 (1983), seemed to point in the opposite

direction. It appeared to indicate that an instruction which caused a jury to approach a capital sentencing decision with diminished responsibility and thus was detrimental to the defendant would not be unconstitutional.

Finally, the ends of justice require consideration of Mr. Adams' claim. Mr. Adams should not be put to death under a sentence based on the recommendation of a jury which was supposed to serve as the conscience of the community but was emphatically and repeatedly told that it had no responsibility for the sentence so that a death sentence did not rest on its conscience.

ARGUMENT

I.

THE TRIAL JUDGE'S REPEATED, STRENUOUS,
FALSE DENIGRATIONS OF THE JURY'S
SENTENCING ROLE VIOLATED MR. ADAMS'
EIGHTH AMENDMENT RIGHT TO A DECISIONMAKER
WHOSE RESPONSIBILITY FOR HIS CAPITAL
SENTENCE WAS NOT UNDERMINED

A. All Members Of The Eleventh Circuit
Have Recognized That This Case
Involves An Especially Egregious
Violation Of The Eighth Amendment

The Eleventh Circuit has divided on the application of Caldwell in Florida cases less extreme than Mr. Adams'. But every member of the court apparently agrees that the Eighth Amendment violation in Mr. Adams' case was unmistakably egregious. Judge Fay's opinion denying relief in Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988) (en banc), joined on the merits by all of the judges who dissented from the grant of relief in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc), em-

phasizes that Mr. Adams' death sentence is unconstitutional because:

"[t]he trial court in Adams incorrectly led the jury to believe that the responsibility for imposing the death sentence rested solely upon himself. The trial judge instructed the jury that he could disregard the jury's recommendation, even if the jury recommended life imprisonment. This was incorrect. * * * Furthermore, the trial court told the jury that: '[T]his conscience part of it as to whether or not you're going to put the man to death or not, that is not your decision to make. That's only my decision to make and it has to be on my conscience. It cannot be on yours.' Adams, 804 F.2d at 1528. Caldwell prohibits such attempts to shield the jury from the full weight of its advisory responsibility."

Harich, 844 F.2d at 1473.²

² Judge Tjoflat's special concurrence, which was joined by the other judges who voted to grant relief in Mann but not in Harich, takes the view that Judge Fay's opinion focuses too much on whether the prosecutor's and judge's statements in Harich "were accurate in a very technical sense" and does "not fully consider whether the jurors were nevertheless left with a misimpression as to the importance of
(Footnote continued)

B. The Jury Has A Vital Role In
Capital Sentencing In Florida

To understand why all the judges of the Eleventh Circuit see Mr. Adams' case as representing a clear Caldwell violation, it is important to consider the jury's vital role in Florida's capital sentencing system.³ Judge Tjoflat's opinion in Mann perceptively analyzes the various contexts in which the Florida Supreme Court has recognized how significant the

(Footnote 2 continued from previous page)
their role." Id. at 1475 (Tjoflat, J., specially concurring). This Court need not in this case decide which of the differing approaches set forth in the various opinions in Mann and Harich it prefers, since the opinion which reads Caldwell most narrowly, Judge Fay's opinion in Harich, emphatically states that Mr. Adams' death sentence violates the Eighth Amendment. See 844 F.2d at 1473.

³ This Court has previously recognized that the deference accorded to a Florida jury's recommendation of a life sentence provides a "significant safeguard" to a capital defendant. See Spaziano v. Florida, 468 U.S. 447, 465 (1984).

jury's recommendation is in a Florida capital sentencing proceeding. 844 F.2d at 1450-53.⁴

Thus, the Florida Supreme Court "has long held that a Florida capital sentencing jury's recommendation is an integral part of the death sentencing process," and has considered the jury's role to be "fundamental." Riley v. Wainwright, 517 So. 2d 656, 657, 658 (Fla. 1987). Accordingly, the jury's recommendation:

"is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless 'the facts suggesting a sentence of death [are] so clear and convincing that virtually no rea-

⁴ As discussed at pages 54-55, infra, the Eleventh Circuit's reading of Florida law is entitled to deference here. Judge Tjoflat (who wrote the Mann decision), Chief Judge Roney and Judge Fay (who were on the panel which unanimously voted in favor of Mr. Adams' Caldwell claim), and other Eleventh Circuit judges are especially familiar with Florida law and have dealt with dozens of Florida death penalty cases.

sonable person could differ.'
Tedder v. State, 322 So. 2d 908,
910 (Fla. 1975). * * *

Holsworth v. State, 522 So. 2d 348, 354
(Fla. 1988); accord Richardson v. State,
437 So. 2d 1091, 1095 (Fla. 1983); Odom v.
State, 403 So. 2d 936, 942 (Fla. 1981),
cert. denied, 456 U.S. 925 (1982); McCas-
kill v. State, 344 So. 2d 1276, 1280 (Fla.
1977). In contrast, the judge's role is
to serve as "a buffer where the jury al-
lows emotion to override the duty of a
deliberate determination" of the appropri-
ate sentence. Cooper v. State, 336 So. 2d
1133, 1140 (Fla. 1976), cert. denied, 431
U.S. 925 (1977).

As discussed in Mann, 844 F.2d
at 1450-52, the jury's recommendation is
to be given great weight both when the
recommendation is life and when the recom-
mendation is death. See, e.g., Tedder v.
State, 322 So. 2d 908, 910 (Fla. 1975)

(jury recommendation of life "should be given great weight" and not overruled unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ"); LeDuc v. State, 365 So. 2d 149, 151 (Fla. 1978), cert. denied, 444 U.S. 885 (1979) ("the recommended sentence of a jury [which in that case was death] should not be disturbed if all relevant data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation"); Smith v. State, 515 So. 2d 182, 185 (Fla. 1987), cert. denied, 108 S. Ct. 1249 (1988) ("a jury recommendation of death is entitled to great weight").⁵

⁵ In a case cited by petitioners (Pet. Br. 56), Wainwright v. Goode, 464 U.S. 78, 86 (11th Cir. 1983) (per curiam), this Court upheld the Florida Supreme Court's affirmance of a death penalty despite the trial judge's consideration of an improper aggravating circumstance.
(Footnote continued)

As the Mann decision goes on to explain, the Florida Supreme Court's "understanding of the jury's sentencing role is illustrated by the way it treats sentencing error," i.e., by vacating a jury's death sentence recommendation which has been followed by a judge if "the proceedings before the original jury were tainted by error." See id., 844 F.2d at 1452-53. For example, the Florida Supreme Court has ordered a new sentencing proceeding before a new jury where relevant mitigating evidence was excluded at the original sentencing proceeding, Valle v. State, 502 So. 2d 1225, 1226 (Fla. 1987); Simmons v. State, 419 So. 2d 316, 320 (Fla. 1982), and where the trial judge instructed the jury not to consider nonstatutory mitigat-

(Footnote 5 continued from previous page)
stance, in part because "[a] properly instructed jury recommended a death sentence."

ing circumstances, Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Combs v. State, 13 Fla. Law W. 142 (Fla. Feb. 18, 1988). Indeed, where the jury recommended death and the judge imposed the death penalty, the Florida Supreme Court has ordered a new sentencing proceeding despite the trial judge's consideration of mitigating evidence that the jury was erroneously prevented from hearing. Messer v. State, 330 So. 2d 137 (Fla. 1976).

The Florida Supreme Court often focuses in such cases "on how the error may have affected the jury's recommendation" -- a focus which, as the Eleventh Circuit has pointed out, "would be illogical unless the supreme court began with the premise that the jury's recommendation must be given significant weight by the trial judge." Given that premise, "if the jury's recommendation is tainted, then the

trial court's sentencing decision, which took into account that recommendation, is also tainted." Mann, 844 F.2d at 1453.⁶

The Eleventh Circuit has also recognized the significance of such Florida cases as Riley. The Florida Supreme Court reversed the imposition of the death penalty in Riley, even though the trial judge did consider mitigating evidence, because that was "insufficient to cure" the erroneous ruling which precluded the jury from considering that evidence. That made the jury's recommendation of death, which the trial judge had upheld, "infirm." 517 So. 2d at 659 n.1.

⁶ As the Eleventh Circuit also pointed out, the Florida Supreme Court's practice of ordering resentencing in cases of improper Witherspoon exclusions, e.g., Chandler v. State, 442 So. 2d 171, 173-75 (Fla. 1983), constitutes an implicit acknowledgement of the jury's "substantive role under the Florida capital sentencing scheme."

As the Eleventh Circuit has said, cases such as Riley demonstrate the Florida Court's understanding "that a jury recommendation of death has a sui generis impact on the trial judge, an impact so powerful as to nullify the general presumption that a trial judge is capable of putting aside error." See Mann, 844 F.2d at 1454. Indeed, as the Eleventh Circuit observed, it would "be surprising were the trial judge, who in Florida is also an electorally accountable official, not powerfully affected by the result" of a process in which "the jury, traditionally depicted as the conscience of the community," has made "a judgment about the appropriateness of death in light of aggravating and mitigating circumstances." Id.

Hence, the State's assertions here that "jury misadvice can never evolve into an actual sentence" (Pet. Br. 12) and

that "[t]here is virtually no statement which could diminish the jury's sense of responsibility for sentencing, because the jury is not the sentencer in the first instance" (Pet. Br. 51), are just as erroneous as its contention in Ferry v. State, 507 So. 2d 1373 (Fla. 1987), that the trial judge's override of the jury's recommendation of life was proper because the judge was the ultimate sentencer and had weighed the circumstances reasonably. In rejecting that argument and reversing the override (as it has done in numerous other cases), the Florida Supreme Court stated:

"Under the state's theory there would be little or no need for a jury's advisory recommendation * * *. This is not the law. Sub judice, the jury's recommendation of life was reasonably based on valid mitigating factors. The fact that reasonable people could differ * * * renders the override improper."

Id. at 1376-77 (emphasis in original).

C. The Repeated Misstatements Made
To Mr. Adams' Jury Deprecating
Its Sentencing Role Undermined
Its Responsibility, In Violation
Of The Eighth Amendment

1. The Jury Was Misled Into
Feeling It Had No
Responsibility For The
Sentencing Decision

As shown at pages 3-11, supra, the judge at Mr. Adams' trial repeatedly stressed to the jury that he could disregard its recommendation and that the capital sentencing determination was not "in any manner whatsoever" on the jurors' consciences or shoulders, but rather rested solely on the judge's conscience and shoulders and was solely his responsibility. But the numerous Florida Supreme Court decisions just discussed and the additional ones cited in Mann (844 F.2d at 1450-54) make clear that in fact the jury's recommendation had to be given great weight by the judge because a Florida jury is supposed to serve as the conscience of

the community in capital sentencing. Moreover, the Florida Supreme Court has much less leeway to overturn a death sentence which follows a jury's recommendation.

2. The Judge's Instructions
Made A Jury Recommendation
Of The Death Sentence More
Likely

Mr. Adams was clearly prejudiced by the judge's misstatements of the jury's sentencing role, since they functioned to undermine the jury's responsibility for the life-or-death decision. This was their very purpose. Thus, the judge interrupted Witherspoon questioning to stress that the jurors "don't vote a death verdict. They only vote the question of guilt or innocence. * * * The obligation is mine." (J.A. 21.) This was manifestly intended to reassure anyone with qualms about accepting responsibility for a death sentence, so that s/he could sit as a ju-

ror and vote for death in Mr. Adams' case with an untroubled soul, in view of the jury's supposedly unimportant role. Indeed, in later Witherspoon questioning, the judge, in the presence of all twelve trial jurors, asked two prospective alternate jurors who had indicated doubt about voting for the death penalty whether they "could not vote for a recommendation to the Judge for a death penalty, even though the Judge is not bound to follow it." See Adams, 804 F.2d at 1533 n.8 (quoting p.369 of trial transcript (emphasis added)).

The judge's frequent reiteration that the sentencing decision was not on the jurors' consciences also made it more likely that they would vote for the death penalty. It clearly is easier to vote for the death sentence if that will not weigh on one's conscience. Jurors who heard the judge say "I do not want you to feel that

it is on your conscience to put the man to death" (J.A. 27) were more likely to vote for death in order to "'send a message' of extreme disapproval for" Mr. Adams' acts even if they were "unconvinced that death [was] the appropriate punishment * * *." See Caldwell v. Mississippi, 472 U.S. 320, 331 (1985) (quoting Maggio v. Williams, 464 U.S. 46, 54-55 (1983) (Stevens, J., concurring)).

Under these circumstances, the death sentence was unconstitutional, since, as in Caldwell, the judge's statements:

"misle[d] the jury as to its role in the sentencing process in a way that allow[ed] the jury to feel less responsible than it should for the sentencing decision."

See Darden v. Wainwright, 106 S. Ct. 2464, 2473 n.15 (1986).

3. Caldwell Is Applicable
Where, As Here, The
Decisionmaker's
Responsibility For A
Capital Sentence Is
Undermined

Caldwell is not, as Petitioners maintain, distinguishable on the ground of state-law differences in the respective sentencing roles of Mississippi and Florida juries. Whether or not those differences would support an accurate description to a Florida capital jury of its actual responsibilities, they cannot sustain the glaringly inaccurate depiction of its role conveyed to Mr. Adams' jurors. The constitutional vice found in Caldwell was not premised on the manner in which Mississippi law divided capital sentencing responsibility between jurors and judges -- a matter which the Eighth Amendment leaves to State option. Spaziano v. Florida, 468 U.S. 447 (1984). The federal constitution neither erects a particular

capital sentencing procedure, see, e.g., Franklin v. Lynaugh, 56 U.S.L.W. 4698 (U.S., June 22, 1988), nor requires that the particular procedure erected in a given State be meticulously followed, see, e.g., Barclay v. Florida, 463 U.S. 939 (1983).

The crucial Eighth Amendment principle that was established in Caldwell, and was violated here, is that the decisionmakers in a capital sentencing process must know with accuracy and not be misled about the nature of their responsibility. As Justice O'Connor stated in Caldwell, the constitutional problem there was that "the prosecutor's remarks * * * were inaccurate and misleading in a manner that diminished the jury's sense of responsibility." 472 U.S. at 342 (O'Connor, J., concurring). Caldwell recognized that one of the Eighth Amendment's fundamental

requirements, reliability in capital sentencing, see, e.g., Gardner v. Florida, 430 U.S. 349 (1977), cannot be assured where the decisionmaker is misinformed about the significance of its judgment.⁷

7

This Court has stressed the reliability requirement in several cases, although none until Caldwell indicated that a crucial aspect of reliability is that the decisionmaker not be misled about its responsibility for the sentencing decision. See, Beck v. Alabama, 447 U.S. 625, 637-38 (1980) (forced choice between a verdict of guilt on a capital offense and a verdict of not guilty creates a false dichotomy which risks an unwarranted conviction, thereby violating the Eighth Amendment's heightened requirement of reliability in capital cases); Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976) (opinion of Stewart, Powell and Stevens, JJ.) (failure to allow particularized consideration of mitigating factors violates Eighth Amendment's "need for reliability"); Johnson v. Mississippi, 56 U.S.L.W. 4561, 4563, 4564 (U.S., June 13, 1988) (Eighth Amendment requirement of reliability was violated when jury was allowed to consider "evidence, that has been revealed to be materially inaccurate") (footnote omitted). California v. Ramos, 463 U.S. 992 (1983), is not inconsistent with these authorities: the majority there found that the "Briggs" instruction

(Footnote continued)

This requirement was surely violated here. Although two Florida Supreme Court justices found Mr. Adams' case similar to cases in which life sentences were generally imposed (see pages 12-13, supra), a majority of that court affirmed his death sentence on the premise that it had been imposed pursuant to the jury's recommendation. Yet, the jurors had been told that Mr. Adams' death would not be on their shoulders, leaving Mr. Adams in the exact predicament described by a noted legal scholar:

"[W]hile the jury may be counting on the fail-safe mechanism of a final review, especially if its availability was announced by the court or counsel, the reviewer in turn will pay heed to the jury's determination that the defendant deserves to die. Here is Alphonse and Gaston

(Footnote 7 continued from previous page)
promoted the jury's accurate understanding of its choices. See Caldwell, 472 U.S. at 342 (O'Connor, J., concurring).

without comedy. In capital sentencing, divided responsibility is avoidance of responsibility."

Gillers, The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing, 18 U.C. Davis L. Rev. 1037, 1108 (1985).⁸

4. The Violation Of The
Eighth Amendment Here
Was Even More Egregious
Than That In Caldwell

What occurred in Mr. Adams' case was worse than what occurred in Caldwell. The misleading statements here were made not by the prosecutor, but by the trial judge. They were emphatic and repeated. They did far more than leave the jury with a potential failure "to appreciate without

⁸ Although the Florida Supreme Court tried to perform the meaningful appellate review described in Spaziano (and referred to in Pet. Br. 55-56), that review was skewed by the distorting effect of the jury's recommendation, which, as this Court said in Spaziano, is supposed to be a "significant safeguard" for the defendant. 468 U.S. at 465.

explanation the limited nature of appellate review * * *." 472 U.S. at 343 (O'Connor, J., concurring). Here, the judge made the out-and-out misstatements that he could disregard the jury's recommendation, that the jury bore no responsibility for a sentence, and that the imposition of a death sentence would in no way rest on the jurors' consciences or shoulders. Neither the judge nor anyone else told Mr. Adams' jurors that "the Jury -- the people -- the people, not the Court -- the people, the heart of the system, must determine -- must determine" the relative weight of the aggravating and mitigating circumstances because "you're in the Jury box to determine the punishment * * *."

See Caldwell, 472 U.S. at 346 (Rehnquist, J., dissenting) (emphasis in original).⁹

D. Petitioners' Attempts To Distort
The Eleventh Circuit's Holding
Must Fail

Petitioners' response to the Eleventh Circuit's cogent recognition of the Caldwell violation in Mr. Adams' case is to turn that holding on its head. Incredibly, the State asserts that the Elev-

⁹ The language in the judge's charge here (referred to in Pet. Br. 47) does not similarly emphasize the jury's role and was in any event overwhelmed by the judge's repeated, emphatic efforts to denigrate the jury's role. Moreover, nothing in either attorney's closing argument emphasized the importance of the jury's sentencing role. Petitioners err in asserting that because the most egregiously improper statements by the judge occurred in voir dire, the Eighth Amendment cannot apply (Pet. Br. 53). These were not, as Petitioners maintain, "extraneous comments in recognition" of the jury's advisory function, but rather were repeatedly stressed statements, referred to again during the closing jury instructions, which misinformed the jury about its function.

enth Circuit "requires that the jury be misled, or at the least, shielded from reality * * *" (Pet. Br. 54.) Actually, what the Eleventh Circuit did was to rectify a proceeding in which Mr. Adams' jury was both misled and shielded from reality, by being repeatedly instructed that they would not be responsible in any way for a death sentence and would not have it on their consciences.¹⁰

As Florida Supreme Court Justice Barkett correctly recognized even before the Eleventh Circuit's en banc opinions in

¹⁰ The Eleventh Circuit's holding here is more limited than the Florida Supreme Court's observation in Garcia v. State, 492 So. 2d 360, 367 (Fla.), cert. denied, 107 S. Ct. 680 (1986): "It is appropriate to stress to the jury the seriousness which it should attach to its recommendation and, when the recommendation is received, to give it weight. To do otherwise would be contrary to Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L.Ed. 2d 231 (1985), and Tedder v. State, 322 So. 2d 908 (Fla. 1975)."

Mann and Harich, petitioners are also incorrect in asserting (Pet. Br. 48) that the decision below either directly or implicitly holds unconstitutional the use of Florida's pattern sentencing instructions. See Combs, supra (Barkett, J., concurring). In Mann, the Court of Appeals held that the judge's charge failed to "correct the false impression left by" the prosecutor's earlier statements, not that the pattern instructions in and of themselves were unconstitutional. See 844 F.2d at 1458. Judge Tjoflat's special concurrence in Harich makes this clear, pointing out that the very same charge given in Mann did not lead to Caldwell error in Harich, because in Harich "the statement was made * * * under entirely different circumstances," i.e., not in the wake of prosecutorial argument which "specifically and repeatedly downplayed the significance of

the jury's role * * *." See Harich, 844 F.2d at 1479 (Tjoflat, J., specially concurring).

In Mr. Adams' case, the constitutional problem is that long before he used the pattern instruction, the trial judge "incorrectly led the jury to believe that the responsibility for imposing the death sentence rested solely upon himself." See Harich, 844 F.2d at 1473. The sentencing phase charge failed to eliminate the unconstitutionality of such repeated misinformation because it did not correct any of the judge's emphatically erroneous statements. Instead, it referred back to them. (See page 11, supra.)

THE PROCEDURAL DEFAULT DOCTRINE
DOES NOT BAR CONSIDERATION OF
MR. ADAMS' EIGHTH AMENDMENT CLAIM

A. There Was No Independent And Adequate
State Procedural Bar To This Claim

The most fundamental of the several reasons why the procedural default doctrine does not bar consideration of Mr. Adams' Eighth Amendment claim is that there was no independent and adequate state procedural bar to its consideration. All but one member of the en banc Eleventh Circuit held in Harich that the panel in Mr. Adams' case had correctly decided that no procedural bar precluded consideration of a Caldwell claim in Florida, both because there was no independent and adequate state procedural ground and because "cause" and "prejudice" existed for the default in any event. See Harich, 844 F.2d at 1472 n. 10, upholding the panel ruling in Harich, 813 F.2d 1082, 1098 n.17 (11th Cir. 1987), which had relied on the

disposition of procedural bar issues in Mr. Adams' case.¹¹

This Court recently re-emphasized that "[A] state procedural ground is not "adequate" unless the procedural rule is "strictly or regularly followed." Barr v. City of Columbia, 378 U.S. 146, 149 (1964).'" Johnson v. Mississippi, 56 U.S.L.W. 4561, 4563 (U.S., June 13, 1988) (quoting Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982)). The Florida Supreme Court's application of a procedural bar in Mr. Adams' case was not "adequate" under the foregoing test.

As the Eleventh Circuit's discussion shows, the Florida courts consider claims raised for the first time in post-

¹¹ Judge Hill, the only judge not to agree that the merits should be decided in Harich, did not address the existence of an independent and adequate bar. See 844 F.2d at 1479-80.

conviction proceedings under Rule 3.850 where the claims (a) are premised on changes in constitutional law that have occurred since the direct appeal or (b) otherwise involve fundamental error. See Adams v. Wainwright, 816 F.2d 1493, 1497 (11th Cir. 1987), citing numerous cases¹² and concluding that "Adams' Caldwell claim is the very type of claim for which Flori-

¹² E.g., Tafero v. State, 459 So. 2d 1034, 1035 (Fla. 1984) (claim premised on Enmund v. Florida, 458 U.S. 782 (1982), a change in law, is cognizable in post-conviction proceedings); Palmer v. Wainwright, 460 So. 2d 362, 365 (Fla. 1984) (suppression of evidence is fundamental error, cognizable in collateral proceedings). More recently, the Florida Supreme Court has addressed in collateral proceedings claims based on Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). E.g., Combs, supra. Indeed, Combs is one of at least three cases in which the Florida Supreme Court has considered Caldwell claims in collateral proceedings (contrary to the assertion in Pet. Br. 28-29 n.7). Others are Mann, see 844 F.2d at 1448 n.4 (construing Mann v. State, 482 So. 2d 1360, 1362 (Fla. 1986)); and Darden v. State, 475 So. 2d 217, 221 (Fla. 1985).

da created the Rule 3.850 procedure."¹³ Hence, the Eleventh Circuit correctly concluded that the Florida Supreme Court's application of the procedural bar here was either based on its incorrect determination that Caldwell has no inapplicability to Mr. Adams' claim¹⁴ or else "represents

¹³ The State cites two inapposite cases as support for its erroneous assertion (Pet. Br. 29 n.7) that "federal constitutional errors are not 'fundamental' errors to which Florida's waiver rule" would apply. The first case, Clark v. State, 363 So. 2d 331 (1978), merely held that the particular constitutional violation there -- a comment on the right to remain silent -- was not fundamental, since it could be harmless error and did not go to the heart of the proceeding. Clark did not say that federal constitutional law changes generically are not fundamental for waiver purposes. The second case, Sanford v. Rubin, 237 So. 2d 134 (Fla. 1970), was a civil case and thus did not involve a collateral proceeding following a criminal trial and appeal.

¹⁴ The Eleventh Circuit correctly noted that this situation is governed by the holding in Ake v. Oklahoma, 470 U.S. 68, 74-75 (1985), that "when resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the (Footnote continued)

application of a procedural bar with regard to a type of claim that Florida does not regularly and consistently bar."

Id.¹⁵

The Eleventh Circuit's analysis of the Florida caselaw of procedural default is entitled to deference in this

(Footnote 14 continued from previous page)

court's holding * * * does not present an independent state ground for the decision rendered." Id. at 75. Ironically, it seems possible that the Florida Supreme Court is prepared to reach the merits of claims such as Mr. Adams', even on successive Rule 3.850 motions, if this Court rules in favor of Mr. Adams on the merits. It recently stated that "[t]he Eleventh Circuit's holdings in Mann and Adams cannot constitute a change of law because only this Court or the United States Supreme Court can effect a sufficient change of law to merit a subsequent post-conviction challenge to a final conviction and sentence." Card v. Dugger, 512 So. 2d 829, 831 (Fla.) (citation omitted), cert. denied, 107 S. Ct. 2203 (1987).

¹⁵ Further inconsistencies in the Florida Supreme Court's application of its procedural bar rules are discussed in the amicus curiae brief submitted by the National Legal Aid and Defenders Association and two other organizations.

Court. As the Court recently said, "[w]e normally defer to Courts of Appeals in their interpretation of state law * * *." Maynard v. Cartwright, 56 U.S.L.W. 4501, 4502 (U.S., June 6, 1988). Such deference is warranted because:

"The federal judges who regularly deal with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues."

Butner v. United States, 440 U.S. 48, 58 (1979) (footnote omitted); accord Brown v. Allen, 344 U.S. 443, 458 (1953). It is particularly appropriate to defer to the Eleventh Circuit panel here, since two of its members, Chief Judge Roney and Judge Fay, have special familiarity with Florida jurisprudence.

B. Mr. Adams Has, In Any Event, Satisfied The Cause And Prejudice Test

The Eleventh Circuit went on to

hold that Mr. Adams has, in any event, shown both cause and prejudice with respect to his failure to raise his Eighth Amendment claim at the time sentence was imposed and his direct appeal was filed in 1979.

1. The Procedural Bar Applied
Here Concerned Only The
Failure To Raise The
Caldwell Claim On Direct
Appeal

Much as the prosecution unsuccessfully attempted to do in Johnson v. Mississippi, 56 U.S.L.W. 4561, 4564 n.7 (U.S., June 13, 1988), petitioners attempt here to translate the Florida Supreme Court's actual procedural default ruling into a different one, apparently because they recognize that the actual ruling will not stand up. They assert (Pet. Br. 33 n.8) that the Florida Supreme Court applied two procedural bars to Mr. Adams' Caldwell claim, one for his failure to

present it on direct appeal in 1979 and the second for his failure to raise it in his first Rule 3.850 proceeding in 1984.

However, the Eleventh Circuit was clearly correct in recognizing that the sole procedural bar which the Florida Supreme Court applied to Mr. Adams' Caldwell claim concerned the failure to present that claim when the direct appeal was filed in 1979, and that it applied a second bar only to claims which -- unlike the Caldwell claim -- had been raised previously and were being raised again in the second Rule 3.850 proceeding. See Adams, 816 F.2d at 1497 n.3. After invoking the abuse-of-procedure rule of McCrae v. State, 437 So. 2d 1388, 1390 (Fla. 1983), to bar two claims which had been decided against Mr. Adams in his prior Rule 3.850 proceeding, the Florida Supreme Court went on to say that the remaining claims, in-

cluding the newly raised Caldwell claim, were barred because "each one either was or should have been raised on direct appeal," a point also made earlier in the opinion.

The abuse-of-procedure ruling could not possibly have applied to the Caldwell claim. The very case, McCrae, which the Florida Supreme Court cited in support of that ruling held (on the very page it cited) that Rule 3.850 permits a second motion stating substantially different legal grounds than the first, and that a successor motion "should not be summarily dismissed solely on the basis that the prisoner has previously filed another Rule 3.850 motion." See 437 So. 2d at 1390.¹⁶

¹⁶ Pet. Br. 33 n.8 misleadingly refers to the present language of Rule 3.850, which does bar the raising of a new claim in a successor 3.850 motion. That language was not added until 1985, after Mr. Adams' first Rule 3.850
(Footnote continued)

2. The Eleventh Circuit
Correctly Determined That
There Was "Cause" For Not
Raising This Eighth
Amendment Claim On Direct
Appeal

In holding that Mr. Adams had established "cause" for not raising his Eighth Amendment claim on direct appeal in 1979, the Eleventh Circuit applied the

(Footnote 16 continued from previous page)
motion had been dismissed. See Mello, Facing Death Alone: The Post-Conviction Attorney Crisis On Death Row, 37 Am. U.L. Rev. 513, 535 (1988). Florida has not retroactively applied the revised part of the rule to cases such as Mr. Adams'. Indeed, it has applied the revised part of the rule to Caldwell claims only where the revision was already in effect and Caldwell had already been decided at the time when the claim was not asserted in the first Rule 3.850 motion. See Delap v. State, 513 So. 2d 1050, 1050-51 (Fla. 1987); Card v. State, 512 So. 2d 829, 831 (Fla.), cert. denied, 107 S. Ct. 2203 (1987). If Florida had retroactively applied the revised part of its abuse-of-procedure rule, that would not be an independent and adequate state ground. See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-58 (1958); Spencer v. Kemp, 781 F.2d 1458, 1470-71 (11th Cir. 1986) (en banc).

standard set forth in Reed v. Ross, 468 U.S. 1 (1984). This Court recently reiterated that under that standard, cause is shown where at the time of the asserted procedural default "'the factual or legal basis for a claim was not reasonably available to counsel * * *.'" Amadeo v. Zant, 56 U.S.L.W. 4460, 4463 (U.S., May 31, 1988) (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)). As Reed made clear, "the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the ["cause"] requirement is met." 468 U.S. at 14 (footnote omitted).

(a) There Were No Cases
Prior To Caldwell
Recognizing The
Eighth Amendment
Principle It
Established

The Eleventh Circuit correctly held that this Court's decision in Caldwell was so novel that the basis for

"cause" enunciated in Reed is satisfied here. See Adams, 816 F.2d at 1498-1500. There were no rulings in 1979 or, indeed, before Caldwell, in this Court or any other court, that to undermine a jury's sense of responsibility for capital sentencing implicates the Eighth Amendment. The Eighth Amendment cases prior to Caldwell contain no hint that a capital sentencer's sense of its own role is a matter of constitutional dimension.¹⁷ To the contrary, a footnote in Dobbert v. Florida, 432 U.S. 282 (1977), suggested that it was appropriate for jurors to take a diminished view of their role as a result of an awareness that the trial judge could over-

¹⁷ Gardner v. Florida, 430 U.S. 349 (1977), was based on the procedural unreliability of allowing a sentencer to consider information which the defendant had no opportunity to explain or deny, not on any particular conception of the gravity of the sentencer's role.

ride their sentencing recommendation. See 432 U.S. at 294 n.7.

Prior to Caldwell, the standard which applied to assertedly improper or misleading jury arguments by prosecutors or instructions by trial judges was not an Eighth Amendment standard at all, but rather the general due process standard of Donnelly v. DeChristoforo, 416 U.S. 637 (1974). As is apparent from this Court's subsequent decision in Darden, 106 S. Ct. at 2472-73 & n.15, the Eighth Amendment standard which Caldwell established is different from Donnelly's due process standard, in that Caldwell holds unconstitutional comments "that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." Id. at 2473 n.15. Caldwell's creation of an Eighth Amendment

requirement that the jury's sense of responsibility not be diminished in a capital sentencing proceeding caused this Court to utilize a fundamentally different constitutional analysis than in Donnelly, where due process analysis was used because no specific bill of rights provision was thought to be infringed by the prosecutor's misconduct. See 416 U.S. at 463.¹⁸

Hence, the constitutional landscape here was far different than in Engle v. Isaac, 456 U.S. 107 (1982), Smith v. Murray, 477 U.S. 527 (1986), or even Reed. A major due process precedent of this

¹⁸ This Court has also recognized in other contexts that due process is a much weaker reed upon which to base a constitutional argument than specific constitutional guarantees, such as the Eighth Amendment. E.g., Spencer v. Texas, 385 U.S. 554, 565 (1967). Compare McGautha v. California, 402 U.S. 183 (1971), with Furman v. Georgia, 408 U.S. 238 (1972).

Court created the basis for the due process claim asserted in Engle, and numerous courts had, in reliance on that precedent, ruled in favor of such claims. Moreover, "dozens" of defendants had raised such due process claims. See 456 U.S. at 131-33. In Smith, this Court said, on the basis of the petitioners' briefs, that similar claims "had been percolating in the lower courts for years at the time of [Smith's] original appeal," and an amicus had attempted to assert that claim in Smith's own direct appeal. See 477 U.S. at 537. The petitioners' reply brief in Smith does, indeed, reveal substantial "percolating": eight federal circuits and two federal district courts had ruled in favor of claims that the Fifth Amendment was violated by the prosecution's use of defendants' disclosures; the Virginia Supreme Court case which rejected such a

claim itself acknowledged that the authorities were split; and the Fourth Circuit decision which Smith asserted as the basis for belatedly raising the claim said that that circuit had substantially answered the question in 1968 -- before Smith's default on direct appeal. See Reply Brief for Petitioner, at 3, Smith v. Murray, No. 85-5487. In Reed, the claim was held to be novel even though at the time of Ross' default, a federal circuit court and the Superior Court of Connecticut had upheld somewhat similar arguments based on the same constitutional provision. Here, in contrast, there was no holding similar to Caldwell under the Eighth Amendment prior to Caldwell.¹⁹

¹⁹ Hence, one concern of the dissent in Reed, see 468 U.S. at 25 (Rehnquist, J., dissenting), is not implicated here. Moreover, the Caldwell claim here, unlike Ross' claim as perceived by the dissent therein, see id. at 22, does go to the heart of fundamental fairness.

(b) Both The Eleventh And
Tenth Circuits Have
Recognized That
Caldwell Was
Sufficiently Novel
Under Reed v. Ross

It is not surprising, therefore,
that both the Eleventh Circuit, in this
and other cases, and the Tenth Circuit en
banc have recognized that Caldwell was
sufficiently novel to satisfy the Reed
test. The Eleventh Circuit concluded that
the "lack of any decisional history indi-
cating that the issues raised by Adams'
Caldwell claim were even addressed by the
Eighth Amendment * * * gives rise to
'cause' in this case." 816 F.2d at 1500-
01 n.8.²⁰

²⁰ The State has not cited any Eighth Amendment
decisions concerning such a claim prior to
Mr. Adams' direct appeal in 1979. Indeed, as
discussed at pages 67, 88-89, infra, even the
cases it cites from later years (which are
irrelevant to the procedural default issue,
see pages 55-58, supra) do not involve the
Eighth Amendment issue involved in Caldwell.

In McCorquodale v. Kemp, 829 F.2d 1035, 1036-37 (11th Cir. 1987), the petitioner (long after Mr. Adams' direct appeal) had unsuccessfully made a due process challenge to a prosecutor's argument. Then, after Caldwell, McCorquodale filed a successor petition challenging the same argument under the Eighth Amendment. The Eleventh Circuit held that the claim was not procedurally barred, because the "case law prior to Caldwell, gave no indication that such statements might violate the eighth amendment." See 829 F.2d at 1036 (which also notes that in Donnelly, this Court had criticized such statements but had held that due process was not violated and that "Caldwell was the first Supreme Court case to hold that prosecutorial statements about appellate review might violate the Eighth Amendment").

Similarly, the Tenth Circuit held that a Caldwell claim was not procedurally barred because at a trial in 1979:

"counsel could not have known that the prosecutor's remarks might have raised constitutional questions. The law petitioner relies on did not become established until the Caldwell decision in 1985. We cannot expect trial counsel to 'exercise extraordinary vision or to object to every aspect of the proceeding in the hope that some aspect might mask a latent constitutional claim.'"

Dutton v. Brown, 812 F.2d 593, 596 (10th Cir. 1987) (en banc) (quoting Engle, 456 U.S. at 113).²¹

²¹ The holding in Caldwell that there were no adequate and independent state grounds for a procedural bar does not, as the State asserts (Pet. Br. 31-32), show that Caldwell was not novel. Just as, on this appeal, the Court can obviate any consideration of the cause and prejudice test by recognizing that there were no adequate and independent state grounds, see pages 50-55, supra, this Court obviated such consideration in Caldwell.

(c) State Law Decisions
Not Involving The
Eighth Amendment Did
Not Make Mr. Adams'
Eighth Amendment
Claim Available
Prior To Caldwell

Petitioners cite (Pet. Br. 19) state-law decisions, none of which concerned the Eighth Amendment, in an effort to show that the tools were available to assert Mr. Adams' Eighth Amendment claim prior to Caldwell. However, as this Court stated in Engle, what is pertinent is whether the basis of the "constitutional claim" now being asserted was available and whether other "counsel have perceived and litigated that claim * * *." 456 U.S. at 134 (emphasis supplied); accord Reed, 468 U.S. at 14-16.

The state-law condemnation of a practice does not support or suggest its federal unconstitutionality. For example, Donnelly itself quoted Cupp v. Naughten,

414 U.S. 141, 146 (1973), in emphasizing that the fact that an instruction "is undesirable, erroneous, or even 'universally condemned'" is not a constitutional basis for relief, unless "it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." 416 U.S. at 643 (footnote omitted). Similarly, in Barclay v. Florida, 463 U.S. 939 (1983), the plurality opinion stated that "mere errors of state law are not the concern of this Court, Gryger v. Burke, 334 U.S. 728, 731 (1948), unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution," Id. at 957-58.²² The Court has also recognized the difference for exhaustion purposes, holding that "It is not enough * * * that a somewhat similar

²² Accord Engle, 456 U.S. at 121 n.21.

state-law claim was made." Anderson v. Harless, 459 U.S. 4, 6 (1982) (per curiam).

When this Court decided Caldwell, that was the first time that any court had recognized the constitutional right upon which Mr. Adams' current claim is based: an Eighth Amendment right against the undermining of a capital sentencer's decisionmaking responsibility. Prior to Caldwell, the only basis for a cognate claim would have been some state-law conception of the jury's role in that State's particular sentencing scheme -- hardly a sufficient foundation for a federal constitutional argument.²³ Since no constitutional basis for Mr. Adams' Eighth Amendment contention existed before Cald-

²³ Indeed, the dissent in Caldwell attacked the majority for creating "an independent Eighth Amendment norm." See 472 U.S. at 350 (Rehnquist, J., dissenting).

well, he has demonstrated ample "cause" within Reed v. Ross for his failure to raise that contention on direct appeal.²⁴

3. The Eleventh Circuit
Correctly Determined
That Mr. Adams Has
Shown "Prejudice"

The Eleventh Circuit rightly held that Mr. Adams has shown "prejudice" here, since there was "an impermissible

²⁴ We will not address the issue of the retroactivity of Caldwell, which the Criminal Justice Legal Foundation seeks to raise as amicus curiae. That issue was nowhere raised or considered below; it is not presented in the certiorari petition; and petitioners continue to say that it need not be considered (Pet. Br. 36 n.9). Nor should it be. See United States v. Taylor, 56 U.S.L.W. 4744, 4745 n.6 (U.S., June 24, 1988) ("Inasmuch as [an] argument was neither raised below nor pressed here, we do not consider it."); Illinois v. Gates, 462 U.S. 213, 217-24 (1983) (Court should not consider issue not raised or decided in the court below); Amadeo v. Zant, 56 U.S.L.W. 4460, 4464 n.6 (U.S., May 31, 1988) (party which failed to contest point below cannot argue it here); Arizona v. Hicks, 107 S. Ct. 1149, 1155 (1987) (Court would not consider a basis for reversal which "was not the question on which certiorari was granted").

danger that the jury's recommended sentence was unreliable and, consequently, that Adams' death sentence was unreliable." 816 F.2d at 1501 (footnote omitted). As discussed at pages 10-11, supra, the trial judge never withdrew or corrected his repeated statements about the jury's complete lack of responsibility for capital sentencing or his assurances that the death sentence would not in any way rest on the jurors' consciences or shoulders -- which he repeatedly emphasized were the "most important" things for the jurors to understand.²⁵

²⁵ The State's assertion that Mr. Adams was somehow benefitted by these egregiously misleading instructions (see Pet. Br. 39-42) is plainly incorrect. Telling jurors that the decision to impose the death penalty is not on their consciences can only serve to relieve them of whatever inhibitions or hesitations they may have to vote for a sentence of death -- a sentence that would normally weigh far more on a juror's conscience than life imprisonment. The State's attempt to rely (Pet. Br. 40-41) on Justice Stevens' dissent (Footnote continued)

Mr. Adams was further prejudiced on his appeal to the Florida Supreme Court. Even if the trial judge had opted to override a jury recommendation of life -- a recommendation which a jury unaffected by Caldwell error could readily have made in view of the three mitigating circumstances present (see pages 11-12, supra) -- the Florida Supreme Court would then have applied the Tedder standard on appeal.

(Footnote 25 continued from previous page)

in Rose v. Lundy, 455 U.S. 509 (1982), is also meritless. Justice Stevens specifically said that he would grant relief, even absent an objection at trial, when "the validity of the underlying judgment" is infected. Id. at 544 (Stevens, J., dissenting). Indeed, Justice Stevens has voted to grant habeas corpus relief in such cases as Francis v. Franklin, 471 U.S. 307 (1985), in which no objection was made at trial to a harmful, burden-shifting instruction. Similarly, the State's citation (Pet. Br. 41) of Henderson v. Kibbe, 431 U.S. 145 (1977), is inapposite because Mr. Adams' case, unlike Kibbe, does involve "a misstatement of the law." See 431 U.S. at 155.

Thus, the jury's recommendation would have had to be reinstated unless "virtually no reasonable person" would have voted for anything but the death sentence. 322 So. 2d 908, 910 (Fla. 1975). Since only one more justice would have had to join Justices Boyd and McDonald (who, even absent a jury recommendation of life, believed the sentence to be disproportionate to sentences in similar cases) in order to reverse an override of the jury's recommendation, see Vasil, 374 So. 2d 465 (Fla. 1979), cert. denied, 446 U.S. 967 (1980), there is a substantial likelihood that any death sentence imposed on Mr. Adams would have been reversed.

C. The Interests Of Justice Require
Consideration Of Mr. Adams' Claim,
Which Involves The Perversion Of
The Jury's Deliberations On The
Ultimate Question

Mr. Adams is, in any event, entitled to consideration of his Caldwell claim, under the "fundamental miscarriage of justice" exception to the cause and prejudice test, whose application to a capital sentencing proceeding was enunciated in Smith v. Murray, 477 U.S. at 537-38. Smith makes clear that there is a "fundamental miscarriage of justice" if the alleged constitutional error "serve[d] to pervert the jury's deliberations concerning the ultimate question * * *." Id. at 538.²⁶ In Smith, that test was not met because there was no

²⁶ This test plainly does not require, as the State asserts (Pet. Br. 36-38), that a prisoner demonstrate his "entitlement to a sentence less than death" or that he was innocent of any statutory aggravating circumstance.

allegation that the challenged testimony was "false or in any way misleading." Id.

In Mr. Adams' case, the jury was repeatedly and emphatically provided with information about its "deliberations concerning the ultimate question" that was both false and misleading and thus served to pervert the jury's sentencing recommendation. As discussed above, if there had not been such perversion, there was a significant possibility that the jury would have recommended a life sentence.

III.

THIS CASE PRESENTS NO OCCASION TO FIND AN ABUSE OF THE WRIT

A. Abuse Of The Writ Is Not A Question On Which Certiorari Was Granted

Abuse of the writ, although the first issue discussed in petitioners' brief, was not mentioned anywhere in the Questions Presented in the State's petition for certiorari. Those questions con-

cerned the application of Caldwell and of the procedural default principles enunciated in Reed v. Ross.

Rule 23(1)(c) of the Rules of the Supreme Court states that "Only the questions set forth in the petition or fairly comprised therein will be considered by the court." As noted above, this Court recently adhered to the rule in Arizona v. Hicks, 107 S. Ct. 1149, 1155 (1987), declining to consider a question beyond the scope of those on which certiorari had been granted. No reason to ignore the Court's rules appears here.

B. Mr. Adams' Eighth Amendment Claim
Was Not Available At The Time Of
His First Federal Habeas Petition

Mr. Adams cannot be held to have abused the writ by failing to raise his Eighth Amendment claim in his first federal habeas corpus petition in 1984, because at that time he could not have gotten a

ruling on the merits of that claim. The Florida courts would have applied a procedural bar to the claim, for failure to raise it on appeal, just as they did later, in 1986. But at that point, prior to Caldwell, Mr. Adams would have been unable to overcome the procedural bar.

For even if somehow there had been tools to formulate the Caldwell claim prior to the decision in Caldwell,²⁷ there would still have been no basis for asserting, under Reed v. Ross, that this claim was based on a constitutional principle newly articulated by this Court which had not previously been recognized. See 468 U.S. at 17. Until Caldwell, this Court

²⁷ In reality, as explained at pages 88-93, infra, the developments after Mr. Adams' direct appeal and before his first habeas corpus petition was filed did not make his Eighth Amendment claim any more available in 1984 than it had been in 1979.

had not articulated the constitutional principle that there is an Eighth Amendment right against impairment of a capital sentencer's decisionmaking responsibility. Hence, without the benefit of the Court's Caldwell holding, Mr. Adams could not have shown "cause" for the default. Nor could he have shown that the Eighth Amendment violation was a fundamental miscarriage of justice. Nor, by the same token, could he have shown that this Eighth Amendment claim was so fundamental that the Florida Supreme Court's application of a procedural bar would be inconsistent with its treatment of novel constitutional holdings and other fundamental errors and hence would not constitute an independent and adequate state ground of decision.²⁸

²⁸ After this Court rendered its ruling in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), the Florida Supreme Court recognized that
(Footnote continued)

Accordingly, the failure to assert the Eighth Amendment claim in Mr. Adams' first federal habeas corpus petition was not abusive. If anything, the raising of such a claim without any chance of getting a decision on its merits would have disserved the purposes of the writ.²⁹

C. If Abuse Of The Writ Principles
Were Applicable Here, Mr. Adams
Could Not Be Properly Held
To Have Violated Them

If this Court nevertheless elects to consider petitioners' abuse-of-

(Footnote 28 continued from previous page)
Hitchcock claims were so fundamental that procedural bars did not apply, see, e.g., Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987), whereas prior to Hitchcock, such relief from procedural bars could not have been obtained, since the Florida Supreme Court believed that the constitutional claims lacked merit, see Sireci v. State, 399 So. 2d 964, 972 (Fla. 1981).

²⁹ See Ritter v. Thigpen, 828 F.2d 662, 665-66 (11th Cir. 1987) (holding of another circuit and even a grant of certiorari do not constitute new law making a claim newly available, for purposes of abuse of the writ).

the-writ argument, the applicable test must be that set forth in Smith v. Yeager, 393 U.S. 122, 126 (1968), which held that the failure to assert a constitutional right or privilege at a time "when the right or privilege was of doubtful existence," followed by the assertion of the right or privilege after a holding of this Court establishes its existence "constitutes no abuse of the writ of habeas corpus." Id. Smith was this Court's articulation of the principles enunciated in Sanders v. United States, 373 U.S. 1, 17-19 (1963), at the time that Congress, in 1976, decided to freeze the Sanders principles into Rule 9(b) of the Federal Habeas Corpus Rules. At that time, Congress rejected this Court's draft of the rule, which would have replaced Sanders' principles with a rule providing that newly raised issues would be forfeited if the

failure to present them in a prior petition was "not excusable." See H. Rep. No. 94-1471, 94th Cong., 2d Sess. 8, reprinted in 1976 U.S. Code Cong. & Admin. News 2478, 2485.³⁰

Congress rejected the "not excusable language,"³¹ and amended the proposed rule by substituting for it the phrase "constituted an abuse of the writ." The Senate Report which accompanied the change stated that its purpose was to

³⁰ The advisory committee's comments suggested that the proposed rule was intended to give the courts greater discretion than had existed to dismiss newly raised claims. See Clinton, Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts, 63 Iowa L. Rev. 15, 38-39 (1977).

³¹ See H. Rep. No. 94-1471, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. Code Cong. & Admin. News 2478, 2482 (suggesting that the "not excusable" language "created a new and undefined standard that gave a judge too broad a discretion to dismiss a second or successive petition").

bring "Rule 9(b) into conformity with existing law," id., i.e., Sanders and Smith v. Yeager.

Hence, even were this Court to disagree with the wisdom of Rule 9(b), such a disagreement would not allow the Court to ignore the judgment of Congress and to fashion a new standard. "To allow otherwise 'would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing.'" Bank of Nova Scotia v. United States, 56 U.S.L.W. 4714, 4715 (U.S., June 22, 1988). As Justice White stated in Autry v. Estelle, 464 U.S. 1301 (1983):

"In my view, it would be desirable to require by statute that all federal grounds for challenging a conviction or a sentence be presented in the first petition for habeas corpus. Except in unusual circumstances, successive writs would be summarily denied. But historically, *res judicata* has been inap-

plicable to habeas corpus proceedings * * * and 28 U.S.C. § 2244 (a) and 28 U.S.C. § 2254 Rule 9 implicitly recognize the legitimacy of successive petitions raising grounds that have not previously been presented and adjudicated."

Id. at 1303.³²

D. The Legal Developments Cited By The State Did Not Provide A Reasonable Basis For Asserting Mr. Adams' Eighth Amendment Claim In 1984

The State makes some irrelevant arguments and cites various legal developments after 1979, as well as the old

³² Even if this Court were free to adopt a new standard, it should not be as harsh on prisoners as the cause and prejudice test, which was adopted to meet a different problem and will apply to any violation of a state procedural bar anyway. The procedural default doctrine was adopted out of concerns for both finality and federalism. See Engle v. Isaac, 456 U.S. 107, 130 (1982). Only the former concern is involved when a prisoner asserts a new claim in a second federal habeas corpus petition. Since the earlier judgment involved was that of the federal court itself, the chief tension to be resolved is simply that between finality, on the one hand, and the interest in effectuating prisoners' federal constitutional rights, on the other hand.

state-law cases discussed at pages 69-71, supra, in asserting (see Pet. Br. 18) that a competent attorney would have raised Mr. Adams' Eighth Amendment claim in 1984. One point that should be set aside at the outset is the insinuation that Mr. Adams' counsel may have engaged in "a mere delaying tactic" (see Pet. Br. 17). As described at pages 13-14, supra, far from engaging in delay, Mr. Adams' volunteer counsel, without any experience in capital litigation and lacking anyone with experience in collateral litigation to provide guidance, was forced to put together a Rule 3.850 motion and then a habeas corpus petition within a small number of days. Counsel's predicament was so outrageous that it has been described in a law review article, to "illustrate the accelerating counsel problem in Florida." See Mello, supra, at 569, 571-74.

Clearly, this was not a situation in which a known claim was deliberately withheld. Unlike Woodard v. Hutchins, 464 U.S. 377 (1984), there is an explanation for Mr. Adams' raising the Caldwell claim only in the second petition: the claim is premised upon a major intervening development, this Court's holding in Caldwell. As the Eleventh Circuit has recognized, such an Eighth Amendment claim had not "been raised and considered in a number of other cases at the time" of Mr. Adams' first habeas corpus petition, nor had this Court's precedents indicated that the Eighth Amendment was implicated by statements which undermined the jury's sense of responsibility for capital sen-

tencing. See Adams, 816 F.2d at 1495-1496 & nn. 1 & 2.³³

The State asserts incorrectly that such precedents did exist. The two Eleventh Circuit cases it cites (Pet. Br. 19-20) raised due process claims, not Eighth Amendment claims. Hence, for the reasons set forth at pages 62-63, supra,³⁴

³³ The State is simply incorrect in contending (Pet. Br. 23) that the Eleventh Circuit ignored the question of abuse of the writ and did not consider the state of the law at the time of Mr. Adams' first habeas corpus petition. The State seems to have overlooked the section of the Eleventh Circuit's opinion entitled "Abuse of the Writ." See 816 F.2d at 1495-96.

³⁴ This Court has recognized in the context of exhaustion that claims raised under different constitutional provisions or different constitutional analyses are not the same. See Picard v. Connor, 404 U.S. 270, 276-78 (1971) (Fifth and Fourteenth Amendment claim of denial of right to indictment by grand jury, as applied to states by due process, is not substantially the same as an equal protection claim); Anderson v. Harless, 459 U.S. 4, 7 & n.3 (1982) (claim of broad federal due process right to jury instructions which properly explain state law is not the same consti-
(Footnote continued)

they provided no basis for the Eighth Amendment claim Mr. Adams is now asserting. Indeed, in one of those cases, McCorquodale, the petitioner was permitted following Caldwell to assert an Eighth Amendment claim based on the same facts as his earlier due process claim. See page 67, supra.

Another instance relied upon by the State (see Pet. Br. 33-34) is the litigation involved in Moore v. Maggio, 740 F.2d 308, 319-21 (5th Cir. 1984). But the Eighth Amendment claim raised -- and rejected -- in that case was not the claim being raised here. Instead, it was a claim that the Louisiana Supreme Court had failed to engage in "meaningful appellate

(Footnote 34 continued from previous page)
tutional claim as one based on the more particular analysis developed in such cases as Sandstrom v. Montana, 442 U.S. 510 (1979)).

review." Indeed, if the harried, inexperienced counsel representing Mr. Adams at the time of his first habeas petition had somehow gotten a copy of this month-old Fifth Circuit decision, they would probably have skipped right over the section of the opinion entitled "Meaningful Appellate Review," which discussed and rejected that different Eighth Amendment claim.³⁵

The only other authorities cited by the State, aside from the state court decision in Caldwell v. State, 443 So. 2d 806 (Miss. 1983), in which every justice believed the issue involved to be one of state law, are Justice Stevens' concurrence in Maggio v. Williams, 464 U.S. 46

³⁵ As part of that discussion of the state supreme court's failure to reverse, the Fifth Circuit cited the Eleventh Circuit's rejection of due process claims in the two cases discussed at pages 88-89, supra. See Moore, 740 F.2d at 320.

(1983), and this Court's decision in California v. Ramos, 463 U.S. 992 (1983). In Williams, the Court held that the argument presented was either insubstantial or unpersuasive, and Justice Stevens, who never even referred to the Eighth Amendment, was doubtful that the prosecutor's argument made the trial fundamentally unfair. See 464 U.S. at 52-56.

Ramos also clearly did not provide the tools to make the claim which Mr. Adams is now presenting. It certainly did not clearly foreshadow Caldwell, at least in the eyes of the 7 out of 8 justices who voted in the majority in one case but in the dissent in the other. The dissenters in Caldwell believed that Ramos was not distinguishable and that the asserted Eighth Amendment claim should therefore not be granted, see 472 U.S. at 351 (Rehnquist, J., dissenting), while the Caldwell

majority found it necessary to distinguish Ramos, see id., at 335-36.

In Ramos, the closest this Court came to discussing the diminution of a jury's sense of responsibility was in saying that telling the jury that a death sentence could be commuted "may incline them to approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencers" and thus "may operate to the defendant's distinct disadvantage." 463 U.S. at 1011. This was followed on the next page with the statement that in view of the Court's holding that what occurred in Ramos was constitutional, "we do not suggest, of course, that the Federal Constitution prohibits an instruction regarding the Governor's power to commute a death sentence." Id. at 1012 n.27. So, if anything, this

discussion was the opposite of a tool to use to make an Eighth Amendment challenge. This Court seemed to be saying that even if the jury had its sense of responsibility undermined, that "of course" would not be unconstitutional.³⁶

E. The Ends Of Justice Require
Consideration Of Mr. Adams' Claim

Mr. Adams' claim should be considered in any event, because the core Eighth Amendment "standard of reliabil-

³⁶ As the Eleventh Circuit has pointed out, Ramos rejected an Eighth Amendment argument that there was "an unacceptable level of unreliability in the capital sentencing determination," that the jury was "deflected * * * from its task" and that "the instruction was misleading * * *." Adams, 816 F.2d at 1495 (citing Ramos, 463 U.S. at 998). The Eleventh Circuit also noted that Ramos indicated (a) that the principal concern of Eighth Amendment jurisprudence was procedure, not substantive factors, and (b) that except for the substantive limits which this Court had previously imposed, the State was free to choose the substantive factors which capital sentencing juries would consider. Adams, 816 F.2d at 1495 (citing Ramos, 463 U.S. at 999, 1001).

ity," Caldwell, 472 U.S. at 341, has not been met here, in view of the "inaccurate and misleading" statements by the trial judge which denigrated the jury's role in capital sentencing. See id. at 342 (O'Connor, J., concurring).³⁷ Elemental justice requires that Mr. Adams not die without a constitutionally reliable sentencing proceeding wherein the consciences of the community have an undiminished sense of their responsibility and an accurate understanding of the consequences of their decision, and do consider the sentence imposed to be on their consciences.

³⁷ The State cites (Pet. Br. 17-18) the plurality opinion in Kuhlmann v. Wilson, 477 U.S. 436 (1986) and the Court's statement in Smith v. Murray that the concept of colorable innocence "does not translate easily" to capital sentencing proceedings, 477 U.S. at 537. But it does not seem to argue for the use of that concept, nor does it explain how the concept would be translated. In any event, Kuhlmann involved the repeated raising of the same claim, not the raising for the first time of a new claim. And as discussed at pages 76-77, supra, Mr. Adams does come under the exception enunciated in Smith v. Murray.

CONCLUSION

For all the reasons set forth above, Respondent respectfully requests that this Court affirm the judgment of the Eleventh Circuit.

Dated: July 2, 1988

Respectfully submitted,

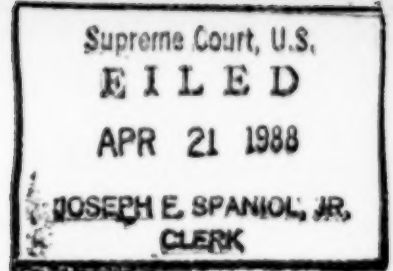
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87-121



**IN THE SUPREME COURT
OF THE UNITED STATES**

OCTOBER TERM, 1987

RICHARD L. DUGGER, *et al.*,

Petitioner,

vs.

AUBREY DENNIS ADAMS, JR.,

Respondent.

**On Writ of Certiorari to the United States Court of
Appeals for the Eleventh Circuit**

**BRIEF AMICUS CURIAE OF
THE CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF PETITIONER**

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Questions Presented:*

1. Does this court's holding in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that a capital sentencing jury may not be told that its decision is subject to further review, apply to the Florida advisory jury system where the trial judge makes the final sentencing decision?

2. Can Question 1 be considered on federal habeas when (1) the judgment became final before *Caldwell* was decided; (2) petitioner did not raise a *Caldwell* claim on direct appeal; and (3) the state courts have refused to consider the *Caldwell* claim on state collateral review on the ground that it was not raised on appeal?

This brief *amicus curiae* will address only Question 2.

* In this case, the parties have presented sharply different statements and counterstatements of the questions presented. Different as they are, both statements focus on whether there is split of authority in lower courts and whether the court below misapplied this Court's precedents. While these considerations are highly relevant to the decision to grant certiorari, they have little value in framing the discussion once certiorari is granted. We therefore submit this statement of the questions in the hope that the Court may find it helpful.

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87-121

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**BRIEF AMICUS CURIAE OF
THE CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF PETITIONER**

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The present case involves the extended relitigation of the legality of a trial conducted many years ago in compliance with the then-existing standards. Such unnecessary relitigation is contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF ARGUMENT

In *Reed v. Ross*, 468 U.S. 1 (1984), this court held that a claim could be presented on federal habeas corpus despite the petitioner's default under state procedure if the claim invoked a subsequent decision of this Court which was both a clear break with the past and a case which applies retroactively. A *Reed* claim therefore necessarily implicates retroactivity analysis if the retroactivity on the new rule on habeas has not been previously resolved.

This Court, having accepted the Harlan-Powell view of retroactivity on direct review, should also accept that view on habeas corpus. Once that is done, the class of claims qualifying under *Reed v. Ross* shrinks to nearly zero. Claims sufficiently novel to avoid the procedural bar will nearly always be nonretroactive on habeas corpus.

ARGUMENT

A. Habeas corpus as an instrument of collateral attack is at best a distant relative of the historical "Great Writ."

Suggesting that habeas corpus be limited, as we will below, invariably produces a vehement reaction. "Any murmur of dissatisfaction with [collateral attack on convictions] provokes immediate incantation of the Great Writ, with the inevitable initial capitals, often accompanied by a

suggestion that the objector is the sort of person who would cheerfully desecrate the Ark of the Covenant." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142, 142 (1970). Before turning to the particular question at hand, then, it may be best to note a frequently overlooked aspect of the writ. Habeas corpus as we know it is vastly different in both purpose and function from the procedure on which Blackstone heaped his famous praise. See 3 W. Blackstone, *Commentaries* 129-138 (1768). The historical writ was used only for release from custody, *Wales v. Whitney*, 114 U.S. 564 (1885), and could not reverse a judgment of a competent court. Today's writ of collateral attack does not necessarily involve custody, *Carafas v. Lavelle*, 391 U.S. 234, 238 (1968), and nearly always involves a judgment of a court of unquestioned jurisdiction.

Habeas corpus developed through the centuries as various arms of government competed with each other for power. W. Duker, *A Constitutional History of Habeas Corpus* 12 (1980). First, the superior courts used it to establish superiority over local courts. *Id.* at 27-33. Then it became an instrument in the struggle between law and equity. *Id.* at 33-35. Finally, habeas corpus was a weapon in the struggle between crown and Parliament. *Id.* at 40-48.

The writ was usually issued to free a person summarily imprisoned by the executive, although summary judicial imprisonments were sometimes involved. *Bushell's Case*, 124 Eng.Rep. 1006 (1670). A conviction by a court of *limited* jurisdiction might be questioned as to jurisdiction, but the writ was denied if the prisoner was in custody for conviction of a crime by a court of competent jurisdiction. See 3 Blackstone, *supra*, at 132 (piracy conviction in ad-

miralty unquestionable). The Great Writ was simply unavailable for collateral attack on such a judgment.

The writ was brought to America and incorporated in our Constitution. U.S. Const. art. I § 9. The first Congress expressly granted the federal courts power to issue the writ. Judiciary Act § 14, 1 Stat. 81 (1789). The common law limitation remained, however. "An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous." *Ex Parte Watkins*, 28 U.S. (3 Pet.) 193, 203 (1830).

The limitation recognized in *Watkins* remained unchanged and was generally understood to be in force in 1867. In that year, Congress extended the federal writ to state prisoners detained in violation of federal law, but gave no indication that it intended to change the *Watkins* rule. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv.L.Rev. 441, 474-77 (1963).

The development of habeas corpus as a device to relitigate questions already decided by courts of competent jurisdiction was entirely a judicial invention. It began with the idea that the imposition of both fine and imprisonment, under a statute authorizing only one or the other, was beyond the "jurisdiction" of the court. *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 176 (1873). It was further expanded with the holding that a federal court has no jurisdiction to try an "infamous" crime without an indictment. *Ex parte Wilson*, 114 U.S. 417, 429 (1889). The outer limit of nineteenth century collateral attack was reached in *Ex parte Siebold*, 100 U.S. 371 (1879). On the theory that an unconstitutional statute is absolutely void, it was held that con-

stitutionality of the statute creating the offense could be reconsidered on habeas. *Id.* at 376-377. The rule was still in force, though, that errors of procedure could not be collaterally attacked, even if they rose to constitutional stature. *In re Belt* 159 U.S. 95 (1895) (validity of jury waiver statute); *Matter of Moran* 203 U.S. 96, 105 (1906) (allegedly forced self-incrimination not "jurisdictional").

Inquiry into procedural error was made available in the twentieth century to meet an overriding need. Black defendants were being wrongfully convicted due to infection of the system by racial prejudice, and direct review by this Court was insufficient to correct the injustices. See *Friendly*, *supra* p. 3, at 154-55; *Bator*, *supra* p. 4, at 523. In *Moore v. Dempsey*, 261 U.S. 86 (1923), the petitioners had been convicted in a mob-dominated trial and the state corrective process had made no serious inquiry into the due process issue. *Id.* at 87-90; cf. *Frank v. Magnum*, 237 U.S. 309, 333-336 (1915) (state court carefully considered question and decided trial was not mob-dominated). Finally, in *Brown v. Allen*, 344 U.S. 443 (1953), the court addressed the merits of Black petitioners' jury discrimination claims, with only one Justice contending that the state court's resolution of the issue be accepted as final. *Id.* at 545 (Jackson, J., concurring).

The point of this abbreviated history is that the use of habeas corpus as a device to relitigate questions which were or could have been raised in the original trial and appeal is entirely a creation of this Court. The decision in *Brown v. Allen* was not compelled by the common law, the Constitution, or Congress, but only by this Court's need to deal with an urgent sociolegal problem. As the problem fades, so does the need for this massive intrusion on the finality of state judgments. *Bator*, *supra* p. 4, at 523-24. Like the Con-

stitution itself, habeas corpus is not as an object of worship to be mummified and preserved unchanged, but rather a flexible doctrine which has been and can continue to be expanded *and contracted* to meet the needs of a changing nation. See Wright, *Habeas Corpus: Its History and Its Future* (Book Review), 81 Mich.L.Rev. 802, 810 (1983); Book Note, 95 Harv.L.Rev. 1186, 1188-89 (1982) (reviewing Duker, *supra* p. 3).

B. Only genuinely new rules are sufficiently novel to constitute "cause" under *Reed v. Ross*.

In *Wainwright v. Sykes*, 433 U.S. 72 (1977), this Court established the general rule that when a state procedural rule bars a claim due to failure to raise it at an earlier stage of the proceeding, a federal court may not consider that claim on habeas unless the petitioner shows cause for the default and resulting prejudice. A tactical decision of the attorney not to raise a claim is not cause. *Smith v. Murray*, ___ U.S. ___, 91 L.Ed.2d 434, 444, 106 S.Ct. 2661, 2666 (1986). Neither is an inadvertent omission on the part of the attorney, if it does not constitute ineffective assistance. *Murray v. Carrier*, ___ U.S. ___, 91 L.Ed.2d 397, 408, 106 S.Ct. 2639, 2645 (1986).

The issue of novelty of the argument as "cause" under *Sykes* is bracketed by the decisions in *Engle v. Isaac*, 456 U.S. 107 (1982) and *Reed v. Ross*, 468 U.S. 1 (1984). Both cases involved claims that jury instructions had unconstitutionally shifted the burden of proof of an element of the offense to the defendant. In *Engle*, the defendants claimed that lack of self-defense was an element of the crimes as defined by Ohio law and that once they showed evidence of self-defense the prosecution must prove its absence beyond a reasonable doubt. The trials had occurred

several years after *In re Winship*, 397 U.S. 358 (1970). In the years between *Winship* and the trials in question, many defendants had relied on *Winship* to challenge instructions placing the burden of proof of particular issues on them. *Engle, supra*, 456 U.S. at 131-33. If a defendant does not lack the tools to construct the constitutional claim, novelty of the argument will not constitute cause for failure to comply with the state procedural rule. *Id.* at 133.

In *Reed v. Ross, supra*, the jury in a murder case was instructed that use of a gun raises a presumption of malice shifting the burden of proof to the defendant. *Reed, supra*, at 6-7. The argument against this instruction would seem on its face considerably *less* novel than the argument advanced in *Engle*. Malice is traditionally an element of murder to be proved by the prosecution, while self-defense is traditionally an affirmative defense which many jurisdictions have required the defendant to prove. See W. La Fave and A. Scott, *Criminal Law* 45, n. 13, 48-49, n. 24, 528 (1972). The *Reed* court distinguished *Engle* by the fact that the trial in *Reed* had occurred before *Winship*. *Reed, supra*, at 19-20.

Novelty will constitute cause "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel." *Reed, supra*, 468 U.S. at 16. The most common instance of a claim without a pre-existing "reasonable basis" is where "this Court has articulated a constitutional principle that had not been previously recognized *but which is held to have retroactive application.*" *Id.* at 17 (*italics added*). *Reed* then equates "not previously recognized" with the "clear break with the past" test. *Ibid.* This "clear break" language is taken from *United States v. Johnson*, 457 U.S. 537 (1982), where the Court indicated that "clear break" cases are "decisions whose nonretroac-

tivity is effectively preordained.” *Id.* at 553-54. The *Reed* court found that the pre-*Winship* authority was sufficiently sparse and that the practice of which Ross complained was sufficiently entrenched that the claim fell into one of *Johnson*’s three “clear break” categories. Therefore defense counsel had no reasonable basis to raise it at trial. *Reed, supra*, 468 U.S. at 18-19.

The threads of retroactivity are woven throughout the fabric of *Reed v. Ross*. They show clearly in all three opinions. Justice Harlan had noted the connection fifteen years earlier, when he pointed out that retroactivity on habeas was not an issue until *Fay v. Noia*, 372 U.S. 391 (1963). *Desist v. United States*, 394 U.S. 244, 261 (1969) (Harlan, J., dissenting). The *Reed* majority noted that retroactivity was a distinguishing characteristic of the primary category of cases to which its rule applied. *Reed, supra*, 468 U.S. at 17. The majority also lifted its “clear break” test directly out of retroactivity law. *Ibid.*

Justice Powell rested his deciding vote on the state’s own procedural default in not raising the retroactivity issue. *Id.* at 20. The dissent noted the paradoxical result:

Consequently, we have the anomalous situation of a jury verdict in a case tried properly by then-prevailing constitutional standards being set aside because of legal developments that occurred long after the North Carolina conviction became final.

* * *

Like the Court of Appeals, the Court proposes to adopt “novelty” as a possible form of “cause” under *Wainwright v. Sykes* to justify ignoring the

State's procedural default rule. But this equating of novelty with cause pushes the Court into a conundrum which it refuses to recognize. The more "novel" a claimed constitutional right, the more unlikely a violation of that claimed right undercuts the fundamental fairness of the trial.

Id. at 21-22 (Rehnquist, J. dissenting).

The correction to the anomaly and the solution to the conundrum, we submit, is to always consider retroactivity with any *Reed* claim and to do so using the Harlan-Powell approach to retroactivity.

C. New decisions are generally not retroactive on collateral review.

The essence of a habeas petitioner's *Reed* claim is that the law has changed in an unexpected way and that he should not be "punished" for a lack of clairvoyance. But are the people of a state not entitled to make the same claim? The people's side of the unexpected change ledger is the issue of retroactivity.

It may be argued that the retroactivity of *Caldwell v. Mississippi* is not before the court, not having been considered below. There are several reasons why the court can and should consider it. First, this Court can consider issues raised for the first time by amicus when they are sufficiently important. *Mapp v. Ohio*, 367 U.S. 643, 646, n. 3 (1961); *Stovall v. Denno*, 388 U.S. 293, 294, n. 1 (1967) (retroactivity raised by amicus). Second is the inseparable connection between *Reed* and retroactivity mentioned above and developed further below. *Reed* was decided the way it was only because retroactivity was not raised. Had it been, the

“swing” vote would almost certainly have gone the other way. *Reed, supra*, 468 U.S. at 20 (Powell J., concurring). Consideration of *Reed* without considering retroactivity results in a distortion of the decision-making process. Third, consideration of the two issues together will result in a single rule for the novel claim situation, saving extensive litigation in the lower courts. Disregard of the issue, as in *Reed*, will leave the lower courts without guidance on the relationship between these two issues, one of which (*Reed*) will never occur without the other, absent a default by the state.

1. *The rise of nonretroactivity: Linkletter-Stovall.*

Under an earlier philosophy of jurisprudence, “retroactivity” was not an issue. Courts did not make law, it was thought, but only announced what had always been the law. 1 Blackstone, *supra*, at 69-70. Unconstitutional statutes were not “invalidated” by the decisions, they had never been true “statutes” at all. *Norton v. Shelby County*, 118 U.S. 425, 442 (1885).

Along with judicial activism and the quasi-legislative promulgation of detailed rules of criminal procedure came the realization that full retroactivity was not constitutionally required. A series of cases in the mid-1960’s established a three-part test for retroactivity: (a) the purpose of the rule; (b) the extent of reliance on previous practice; and (c) the effect on the system of justice of full retroactivity. *Linkletter v. Walker*, 381 U.S. 618, 636 (1965); *Johnson v. New Jersey*, 384 U.S. 719, 727 (1966); *Stovall v. Denno*, 388 U.S. 293, 297 (1967). The central concern of this approach seems to be whether retroactivity is needed to reverse the convictions of innocent people. If a rule has a powerful connection with the reliability of the truth-finding process

and substantial numbers of innocent people have suffered false imprisonment, the reliance factor is swept away and the impact on the system must be borne as the cost of progress. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel established on collateral review); *Johnson, supra*, at 384 U.S. 727-28. Conversely, if the rule would exclude evidence in spite of its reliability to enforce a collateral policy, the social cost of full retroactivity may be prohibitive. *Linkletter, supra*, 381 U.S. at 637-38. (*Mapp* exclusionary rule not retroactive on collateral review). The close cases are those where the impact on truth is a matter of degree. *Johnson, supra*, 384 U.S. at 728-29. In this practical cost-benefit analysis the status of review as direct or collateral had little weight. *Stovall, supra*, 388 U.S. at 300-301.

2. *The Harlan approach.*

By the end of the decade, opposition had begun to form. In *Desist v. United States*, 394 U.S. 244 (1969), Justice Harlan took his stand that "'retroactivity' must be rethought." *Id.* at 258 (Harlan, J., dissenting). Instead of focusing on the purpose of the rule and weighing the costs and benefits of retroactivity, Justice Harlan focused instead on the nature of the judicial process.

The first principle of jurisprudence is that courts decide cases according to the law. The most flagrant violation of this principle is the purely prospective "decision," one that is announced by the court but not applied to the parties before it. Because the power to announce constitutional rules flows solely from the duty to decide cases, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), such "pure" prospectivity is itself of doubtful constitutionality.

A more difficult question arises at the next step of the retroactivity ladder. Ernesto Miranda's conviction was reversed and his confession suppressed. *Miranda v. Arizona*, 384 U.S. 436, 491-92 (1966). Woodrow Whisman, whose similar case was on direct review at the same time, was denied the benefit of the *Miranda* rule. *Whisman v. Georgia*, 384 U.S. 895 (1966) (Douglas, J., dissenting); see *Johnson, supra*, 384 U.S. at 734. How could the Georgia court be correct and the Arizona court in error when they reached the same result under the same circumstances? It may well be socially efficient to so hold. The reversal of Miranda's conviction had nothing to do with the justice of his case, but it was a necessary cost of deterring police misconduct in the future. But is the difference in the treatment of Miranda and Whisman consistent with the Anglo-American system of law built on precedent? Justice Harlan thought not. *Desist, supra*, 394 U.S. at 258-59. If a legislature wishes to treat similarly situated people differently, it must at least have a rational basis for doing so. L. Tribe, *American Constitutional Law* § 16.2 (2d ed. 1988). How can this Court simply conduct a lottery?

The final step is the application of the Harlan theory to collateral review. If one accepts the analysis to this point, including the premise that the nature of the judicial process outweighs cost-benefit analysis, there are two principled answers. One could conclude that new rules must be applied on habeas as well, either on the Blackstone theory that law is discovered and not made, or on the theory that a habeas petition is not significantly distinguished from a direct appeal to apply a different rule. On the other hand, one could conclude both that a habeas petition is fundamentally different from an appeal, *Mackey v. United States*, 401 U.S. 667, 682 (1971) (Harlan, J. concurring and

dissenting), and that the announcement of a truly new rule is an actual change in the law and not just a discovery.¹

If the law has genuinely changed, we must return to the fundamental ground for habeas corpus relief: that the prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Which laws? Those existing at the time of his trial and conviction or those existing at the time of his habeas petition?

To answer the question, we must return to the purpose of the writ. Why do we allow relitigation of convictions already final and already reviewed by one hierarchy of reviewing courts? Is the purpose to correct injustice? If so there would be no reason to limit the review to constitutional questions. We would instead limit the writ to prisoners who are actually innocent. See generally Friendly, *supra* p. 3.

Is the purpose of habeas corpus to give those convicts not granted certiorari by this Court the same scope of review as those who are? If that were the purpose then retroactivity on habeas would be the same as on direct review, a course this Court has not followed, as we will describe below.

Professor Hart has suggested that a prisoner ought to have a federal court hearing on his federal claim. Hart,

1 Whether a rule is truly new is a difficult question in some contexts, but not in the present case, as we will develop in part D, below.

Foreword, 73 Harv.L.Rev. 84, 106-07 (1959). Even if we assume this to be true, though, it does not tell us *why* a federal forum is necessary, and it does not explain why we have collateral attack on federal convictions. 28 U.S.C. § 2255. The most convincing reason for *Brown v. Allen* was advanced by Judge Friendly. “[W]ith the growth of the country and the attendant increase in the Court’s business, it could no longer perform its historic function of correcting constitutional error in criminal cases by review of judgments of state courts and had to summon the inferior federal judges to its aid.” Friendly, *supra* p. 3, at 155 (footnote omitted); see also Bator, *supra* p. 4, at 521, n. 211.

This Court’s workload is such that it must concentrate its limited time on resolving the unresolved issues of American law. Cases must be selected based on the breadth of the issues presented, the number of people they affect, and the extent of disagreement in the lower courts. There may not be time to grant review in a case affecting few people, even where the court below has clearly violated stare decisis and failed to obey a precedent established by this Court.

Calling out the lower federal judges as a posse comitatus to help this Court with its police function does not necessarily imply that the scope of review on habeas must equal this Court’s scope on certiorari or appeal, however. On direct review the question is “Did the court below err?” On habeas corpus the question is “Did the petitioner’s trial violate the Constitution or laws of the United States?” There is no inconsistency in answering different questions differently.

All that is necessary to carry out the purpose of habeas corpus is to determine whether the state courts did their

duty to uphold the Constitution as the supreme law of the land. U.S. Const. art. VI § 2. Within the confines of stare decisis, that means obedience to the precedents established by this Court as of the time of the state court decision. Failure to anticipate a future "clear break" is not a violation.

3. *From Hankerson to Griffith.*

Justice Harlan never convinced a majority of the Court of the soundness of his approach. With his passing in 1971, the approach lost its voice for a few years. In 1977, Justice Powell picked up the torch. In a brief concurrence in *Hankerson v. North Carolina*, 432 U.S. 233, 246-48, he simply stated that it was time the Court adopted the Harlan approach.

In the following years, the Harlan-Powell theory came to control retroactivity *de facto*, whether or not it was acknowledged in the lead opinion. Every significant retroactivity case was decided in favor of retroactivity for direct review and against it on collateral review. *Hankerson v. North Carolina*, 432 U.S. 233 (1977) (*Mullaney v. Wilbur*, 421 U.S. 684 (1975) retroactive on direct); *Brown v. Louisiana*, 447 U.S. 323 (1980) (*Burch v. Louisiana*, 441 U.S. 130 (1979) retroactive on direct); *United States v. Johnson*, 457 U.S. 537 (1982) (*Payton v. New York*, 445 U.S. 573 (1980) retroactive on direct); *Solem v. Stumes*, 465 U.S. 638 (1984) (*Edwards v. Arizona*, 451 U.S. 477 (1981) not retroactive on collateral); *Shea v. Louisiana*, 470 U.S. 51 (1985) (*Edwards* retroactive on direct); *Allen v. Hardy* __ U.S. __, 92 L.Ed.2d 199, 106 S.Ct. 2878 (1986) (*Batson v. Kentucky*, __ U.S. __ 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986) not retroactive on collateral); *Griffith v. Kentucky*, 93 L.Ed.2d 649, 107 S.Ct. 708 (1987) (*Batson* retroactive on direct).

The movement toward acceptance of the Harlan-Powell approach in theory as well as in fact began in *United States v. Johnson*, *supra*. The *Johnson* court decided that all Fourth Amendment decisions not clearly controlled by prior precedents would apply retroactively on direct review. *Id.*, 457 U.S. at 562. Fourth Amendment cases seemed to be a curious place to make this stand. Of all constitutional claims, the exclusionary rule has the least relation to the justice of the case. It came as no surprise, then, that the Court later decided "There is nothing about a Fourth Amendment rule that suggests that in this context it should be given greater retroactive effect than a Fifth Amendment rule." *Shea, supra*, 470 U.S. at 59.

The giant leap came last term in *Griffith*. The Harlan-Powell approach was accepted for all cases on direct review, including those which were a "clear break" from the past. The nature of the process of adjudication and the need to treat similarly situated defendants the same were held to override the considerations of the three-prong test of *Linkletter-Stovall*. *Griffith, supra*, 93 L.Ed.2d at 660-61, 107 S.Ct. at 715-16.

The burning question after *Griffith* is whether there remains any principled reason for not accepting the remainder of the Harlan-Powell approach. See *id.*, 93 L.Ed.2d at 662-63, 107 S.Ct. at 717 (Rehnquist, C. J., dissenting). We submit that there is not.

It may be argued that direct and collateral challenges are not distinguishable for retroactivity purposes. *Id.*, 93 L.Ed.2d at 664, 107 S.Ct. at 718 (White, J., dissenting). Whatever strength that argument had, it was rejected in *Griffith*. There now exists a bright, clear line between direct and collateral review.

The dissent also argued that it was a fortuity that the new rule was established on direct review and not collateral. *Id.* 93 L.Ed.2d at 664-65, 107 S.Ct. at 718. Yet history shows that virtually none of the landmark criminal procedure decisions have been made on federal habeas for state prisoners. Most have been made on direct appeal and a few have been made on appeal from state collateral review. See Friendly, *supra* p. 3, at 165, n. 123. This Court can control its own docket to fish primarily from the stream of direct appeal.

Acceptance of the Harlan-Powell approach does not mean that no new rule will ever be retroactive on collateral review. A decision that a state cannot proscribe the defendant's conduct at all would apply. *Mackey, supra*, 401 U.S. at 692. So would a rule going to the very essence of a fair hearing, such as *Gideon*. *Id.* at 693-94. With over a hundred volumes of cases decided since the criminal procedure revolution began it is doubtful whether any undiscovered rules of *Gideon* magnitude remain, but the theory allows for the possibility.

In short, when *Griffith* established the Harlan-Powell approach on direct review, it did away with the objections to the acceptance of that approach on collateral review. Instead of using one theory for direct review and another theory with fundamentally different premises for collateral review, the Court should adopt the Harlan-Powell approach as the single controlling rule for all retroactivity issues.

D. Any claim sufficiently novel to constitute cause under *Reed v. Ross* is necessarily not retroactive.

The final question, and the one dispositive of this case, is whether a claim that qualifies as “novel” under *Reed v. Ross* can ever qualify for retroactive application on habeas corpus. For a claim to qualify as novel, it must not be a simple application of prior precedent to new facts, but an actual “clear break with the past.” *Reed, supra*, 468 U.S. at 17. The break must be so clear, in fact, that competent counsel would have lacked the tools to construct the claim. *Engle, supra*, 456 U.S. at 133.

We submit that the class of claims novel enough to qualify as cause for default under *Reed* is a subset of those new enough to be denied retroactive effect on habeas. That is, the novelty analysis that establishes the qualification under *Reed* is more than enough to establish that the procedure in question was not in violation of the Constitution or laws of the United States as they stood at the time of the trial. The Court below, applying *Reed* and *Engle*, found respondent’s claim under *Caldwell v. Mississippi*, 472 U.S. 320 (1985) to be so novel at the time of the trial that it was not reasonably available to him. *Adams v. Dugger*, 816 F.2d 1493, 1497-1500 (11th Cir. 1987). Assuming that conclusion to be correct, *Caldwell* is necessarily not retroactive to respondent’s case unless it falls within one of the very narrow exceptions to the general rule of non-retroactivity.

Unquestionably, *Caldwell* does not affect the substantive power of the state to prohibit murder or even to exact death as a punishment for murder. See *Mackey, supra*, 401 U.S. at 692. It would also seem to be beyond question that a *Caldwell* claim is not a claim for nonobservance of those

procedures implicit in the concept of ordered liberty. See *id.* at 693.

Respondent's express claim that he qualifies under *Reed v. Ross* and his implicit claim that *Caldwell* applies retroactively are therefore inherently contradictory. One bar or the other must necessarily apply.

E. There has been no fundamental miscarriage of justice.

This Court has previously noted that there may be a "fundamental miscarriage of justice" exception to *Sykes*. *Engle, supra*, 456 U.S. at 135. For guilt phase error, this means actual innocence. *Murray v. Carrier*, ___ U.S. ___, 91 L.Ed.2d 397, 413, 106 S.Ct. 2639, 2650 (1986). This concept does not easily translate to the penalty phase. In one case, the test applied was whether the error "serve[d] to pervert the jury's deliberations." *Smith v. Murray*, ___ U.S. ___, 91 L.Ed.2d 434, 447, 106 S.Ct. 2661, 2668. The highly speculative possibility that the instructions in this case were detrimental to the defendant can hardly be characterized as perverting the jury's deliberations.

By his own admission, respondent molested and murdered a helpless eight year old little girl. *Adams v. State*, 412 So.2d 850, 851 (Fla. 1982). Whatever "fundamental miscarriage of justice" may mean in the penalty phase, it surely cannot apply to such a case. The miscarriage of justice in this case has been the delay of justice, and hence its denial, for nearly six years after the decision of the Supreme Court of Florida, *id.*, and over five years after denial of certiorari in this Court. *Adams v. Florida*, 459 U.S. 882 (1982).

Conclusion

The decision of the Eleventh Circuit should be reversed and the petition for writ of habeas corpus denied.

Dated: April, 1988

Respectfully submitted,

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No. 87-121

Supreme Court, U.S.

FILED

JUL 1 1988

JOSEPH E. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD L. DUGGER, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
Petitioner,
v.

AUBREY DENNIS ADAMS,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

**BRIEF OF THE NATIONAL LEGAL AID
AND DEFENDER ASSOCIATION,
THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS, AND
THE AMERICAN CIVIL LIBERTIES
UNION OF FLORIDA AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENT**

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

No. 87-121

RICHARD L. DUGGER, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
Petitioner,
v.
AUBREY DENNIS ADAMS,
Respondent.

**On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit**

**BRIEF OF THE NATIONAL LEGAL AID
AND DEFENDER ASSOCIATION,
THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS, AND
THE AMERICAN CIVIL LIBERTIES
UNION OF FLORIDA AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENT**

INTEREST OF *AMICI CURIAE*

Amici curiae have obtained the written consent of the parties to file this brief, as indicated by the consent letters previously filed with the Court.

The National Legal Aid and Defender Association (NLADA) is a non-profit national organization with membership of approximately 4,700 attorneys and organizations. NLADA's primary purpose is to assist in

providing effective legal services to persons unable to retain counsel in criminal and civil proceedings. Attorneys and organizations affiliated with NLADA represent condemned inmates in states throughout the United States.

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a nation-wide membership of over 4,000 lawyers. It is concerned with the protection of individual rights and the improvement of criminal law practice and procedures. Attorneys affiliated with NACDL represent death row inmates in states throughout the country.

The American Civil Liberties Union of Florida is an affiliate of the national American Civil Liberties Union (ACLU). The ACLU is a non-profit organization dedicated to the preservation of the Bill of Rights throughout the United States. Florida ACLU attorneys represent death row inmates throughout the State of Florida.

SUMMARY OF ARGUMENT

In *Wainwright v. Sykes*, 433 U.S. 72 (1977), the Court held that a petitioner's failure to comply with certain kinds of state procedural rules would prevent her from raising claims in federal habeas absent a showing of cause for and actual prejudice resulting from the default. The State argues that under the procedural default principles of *Sykes*, Mr. Adams' constitutional claim is barred from federal habeas corpus review based on a Florida procedural rule that prevents Florida courts from hearing collaterally matters that were not raised but which could have been raised on direct appeal.¹ Brief of the Petitioners at 28-43 & n.7. A state rule is a valid procedural bar only if it is an adequate and independent state ground. The Florida rule in question here fails to

¹ Florida's "raised or could have been on direct appeal" rule is a doctrine of common law origins. *E.g.*, *McCrae v. State*, 437 So.2d 1388, 1390 (Fla. 1983).

satisfy this essential condition in two respects: It is discretionary, and it is applied arbitrarily to capital sentencing issues.

ARGUMENT

The state rule of procedure at issue here is a discretionary and haphazardly applied state procedural rule. As such, it is entitled to no deference under *Wainwright v. Sykes*. The enforceability of such a default rule is a question that has not before been addressed by the Court in the post-*Furman* era of capital punishment.

The Court in *Smith v. Murray*, 106 S. Ct. 2661 (1986), rejected the broad notion that procedural default can never bar federal habeas corpus review in a capital case. State death-sentenced prisoner and federal habeas petitioner Michael Marnell Smith urged the Court, in a Reply Brief footnote, to accept the reasoning of "many commentators [who] have taken the position that procedural defaults in state courts should not bar federal review of any claim that would invalidate a death sentence, at least in the absence of a showing that the petitioner himself deliberately bypassed the state processes." Reply Brief of Petitioner at 7 n.8, *Smith v. Murray*, 106 S. Ct. 2661 (1986) (citing Batey, *Federal Habeas Corpus Relief and the Death Penalty: Finality with a Capital "F,"* 36 U. Fla. L. Rev. 252 (1984); Catz, *Federal Habeas Corpus and The Death Penalty: Need for a Preclusion Doctrine Exception*, 18 U.C.Davis L. Rev. 1177 (1985)).

Justice O'Connor, writing for herself and four other Justices, held that Smith had forfeited his federal claim because he did not assign it as error in his direct appeal to the Virginia Supreme Court. The Court, for the first time in a fully briefed and argued case since the modern resumption of capital punishment, explicitly "reject[ed]" the suggestion that the principles of *Wainwright v. Sykes* apply differently depending on the nature of the penalty a State imposes for the violation of its criminal

laws." 106 S. Ct. at 2668. Justice Stevens, in a dissent joined by three other Justices, argued that the majority failed "to give appropriate weight to the fact that capital punishment is at stake in this case." *Id.* at 2672.

Although a majority of the Court in *Smith* rejected the broad notion that procedural default can never bar federal review in a capital case, *Smith* did not present the question raised by the procedural rule invoked by the State of Florida in Mr. Adams' case. The Virginia rule at issue in *Smith* was absolute and nondiscretionary;² therefore the case in no way presented or resolved—even *sub silentio*—the applicability of a discretionary or haphazardly applied default rule to bar federal claims of condemned inmates.

² Rules 5:17 and 5:25 of the Virginia Rules of Court provide that "only errors assigned in the petition for appeal will be noticed by this court and no error not so assigned will be admitted as a ground for reversal of a decision below." This default rule is on its face uncompromising, unlike Virginia's *trial level* default rule—found in the same Virginia Rules of Court—which permits appellate review of error not objected to at trial "for good cause shown or to enable this court to attain the ends of justice."

These rules appear to be absolute in capital cases. *E.g.*, *Quintana v. Commonwealth*, 295 S.E.2d 643 (Va. 1982); *Coppola v. Warden*, 282 S.E.2d 10 (Va. 1981). The capital statute does require the Virginia Supreme Court to consider and determine two matters even if not enumerated on appeal: (1) whether the death sentence "was imposed under the influence of passion, prejudice or any other arbitrary factor," and (2) whether the sentence of death is "excessive or disproportionate." Va. Code § 17-110.1C (1950 & Repl. Vol. 1982). However, *sua sponte* review seems limited to these two issues. *Fitzgerald v. Commonwealth*, 292 S.E.2d 798 (Va. 1982). We found no capital case in which the Virginia Supreme Court forgave an appellate level procedural default.

I. IN ORDER TO CONSTITUTE A VALID PROCEDURAL BAR UNDER *WAINWRIGHT v. SYKES*, THE PROCEDURAL RULE MUST BE AN ADEQUATE AND INDEPENDENT STATE GROUND

The *Sykes* Court framed the question presented in this way: "In what instances will an adequate and independent state ground bar consideration of otherwise cognizable federal issues on federal habeas review?" 433 U.S. at 78-79.³ The Court reasoned that "it is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts" and that the "application of this principle in the context of a federal habeas proceeding has therefore excluded from consideration any questions of state *substantive* law." *Id.* at 81 (emphasis in original). By contrast, the "area of controversy which has developed has concerned the reviewability of federal claims which the state court has declined to pass on because not presented in the manner prescribed by its procedural rules." *Id.* at 81-82.

Following discussion of the state procedural default at issue and after noting that "all of the Florida appellate courts refused to review petitioner's federal claim on the merits," 433 U.S. at 85, the *Sykes* Court concluded that the failure to object at trial to the admission of the confession in that case "amounted to an independent and adequate state procedural ground which would have prevented direct review here." *Id.* at 87. Thus, for the *Sykes* Court, the adequate and independent state ground issue was treated as a preliminary inquiry to be resolved by reference to the Court's direct review cases.

³ The habeas consequences of the adequate and independent state ground doctrine is also an issue before the Court in *Harris v. Reed*, No. 87-5677. See Brief of the National Legal Aid and Defender Association as *Amicus Curiae* in Support of Petitioner, *Harris v. Reed*, No. 87-5677.

The Courts of Appeal have followed *Sykes*' direction and have treated the adequate and independent state ground doctrine as a condition precedent to the cause-and-prejudice inquiry, taking guidance from this Court's direct review cases in making this preliminary determination. See *Spencer v. Kemp*, 781 F.2d 1458, 1463, 1470 & n.21 (11th Cir. 1986) (en banc) (noting that "if a state possesses an independent and adequate procedural rule," failure to abide by that rule will ordinarily preclude consideration in habeas absent cause-and-prejudice, and reasoning that, in making the threshold determination, the court would be "guided by a series of decisions of the Supreme Court suggesting bases on which an asserted state procedural ground will not be considered independent and adequate for purposes of insulating the state court's rejection of federal claims from federal review"); *Oliver v. Wainwright*, 795 F.2d 1524, 1529 (11th Cir. 1986) (reasoning that "[e]ven were *Sykes* to apply, we could not defer to the state court's rejection of *Oliver*'s constitutional claim unless it were based on an 'independent and adequate' state ground"); *Francois v. Wainwright*, 741 F.2d 1275, 1281 (11th Cir. 1984) (a "federal court should not defer to a state interpretation of a state procedural rule that results in forfeiture of a federal claim unless the state rule and its interpretation are 'independent and adequate'"); *Wheat v. Thigpen*, 793 F.2d 621, 624 (5th Cir. 1986) (refusing to apply cause-and-prejudice tests because no "independent and adequate state grounds exist to prevent federal review," and interpreting *Sykes* as having "specifically held that a federal court may not review a habeas petitioner's federal claims when the state courts have declined to pass on the claims because of an independent and adequate state procedural ground, absent a showing of cause and prejudice"); *Breest v. Perrin*, 655 F.2d 1, 2 n.1 (1st Cir. 1981) (calling the adequacy and independence inquiry "an issue that must be considered before deciding the effect of *Wainwright v. Sykes*"); *Phillips v. Smith*, 717

F.2d 44, 49 (2nd Cir. 1983) (noting that "if the state court relied on an adequate and independent state procedural ground, federal habeas review is unavailable absent a showing of cause and prejudice"); Goodman & Sallet, *Wainwright v. Sykes: The Lower Federal Courts Respond*, 30 Hastings L.J. 1683, 1690-92 (1979) (adequacy and independence are preliminary inquiries); Note, *Applying Wainwright v. Sykes to State Alternative Holdings and Summary Affirmances*, 53 Fordham L. Rev. 1357, 1364-65 & n.41 (1985) (adequacy of state procedural ground is a federal question which federal habeas court has jurisdiction to decide); Note, *On the Threshold of Wainwright v. Sykes: Federal Habeas Court Scrutiny of State Procedural Rules and Rulings*, 83 Mich. L. Rev. 1393, 1416 n.102 (1985) (adequacy for habeas purposes is closely analogous to adequacy for direct review purposes).

II. IN A CAPITAL CASE, A STATE'S INVOCATION OF A DISCRETIONARY STATE PROCEDURAL BAR IS NOT AN ADEQUATE AND INDEPENDENT STATE GROUND

In a capital case, the application of a discretionary state procedural rule constitutes an *inadequate* state ground.

In *Williams v. Georgia*, 349 U.S. 375 (1955), the petitioner, a condemned state prisoner, claimed and the state conceded that the method of selecting the grand jury in his case discriminated on the basis of race. The state court had denied the grand jury challenge on procedural grounds as untimely, even though a state statute gave the court the discretion to entertain the challenge. Justice Frankfurter, writing for the Court, held that the Court had jurisdiction because "*the discretionary decision to deny the motion [for consideration of the federal claim] does not deprive this court of jurisdiction to find that the substantive issue is properly before us.*" *Id.* at 389 (emphasis added). Cf. *Sullivan v. Little Hunting Park*, 396 U.S. 229, 233-34 (1969) (a procedural rule "more

properly deemed discretionary than jurisdictional" does not bar federal review).

It is no accident that *Williams v. Georgia* was a capital case. Justice Frankfurter's idea in *Williams* was that a state court's refusal to exercise discretion to reach the merits of a condemned inmate's constitutional claim was an "act so arbitrary and so cruel . . ., considering that life is at stake," that it constituted a "denial of due process in its rudimentary procedural aspect." *Daniels v. Allen*, 344 U.S. 443, 557-58 (1953) (Frankfurter, J., dissenting) (emphasis added).

The necessity of bridling discretion "considering that life is at stake" has special resonance given the Court's modern death penalty jurisprudence. Unbridled discretion in capital cases obtains constitutional stature; it is the type of discretion which led the Court in *Furman v. Georgia*, 408 U.S. 238 (1972), to invalidate the death penalty as then administered. The Court noted in *Zant v. Stephens* that "[a] fair statement of the consensus expressed by the Court in *Furman* is that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Zant v. Stephens*, 462 U.S. 862, 874 (1983). "Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard v. Cartwright*, 108 S.Ct. —, No. 87-519, slip op. at 5 (U.S. June 6, 1988). See also *Gardner v. Florida*, 430 U.S. 349, 361 (1977) (noting that a practice which injected inconsistency into the procedure for appellate review of the factual bases for death sentences would render the "Florida capital-sentencing procedure . . . subject to the defects which resulted in the holding of unconstitutionality in *Furman*").

At a minimum, *Williams* forbids federal deference to the state courts' exercise of a particular type of discretion in refusing to decide the merits of issues in capital cases: ad hoc, unprincipled discretion that is in a very real sense lawless. Distinguishing permissible guided discretion from ad hoc discretion can be difficult. As Daniel Meltzer has argued, state judges cannot realistically be expected to provide reasoned explanations refuting a possible finding of ad hoc discretion for every issue in every case. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1140-41 (1986). The institutional difficulties of ascertaining whether specific decisions result from ad hoc discretion or from principled discretion led Meltzer to place the burden of proof upon the person whose claim has been forfeited. *Id.* at 1141. Meltzer, however, would reverse the burden in capital cases: "[W]hen state courts have broad discretion to excuse procedural defaults in capital cases, it seems appropriate to shift the burden of persuasion on the question of whether such discretion was exercised in an ad hoc or a principled manner; in view of the stakes involved, the burden should rest on the state, not the defendant." *Id.* at 1122.

A state's invocation of a purely discretionary procedural default rule should not operate to bar habeas review in a capital case. *Amici* therefore advocate not only a shifting of the burden to the State concerning disproving ad hoc discretion, but a per se rule that a state's discretionary decision to procedurally bar the federal claim of a condemned person is not adequate. Such a rule recognizes that the insulation provided by the Court's decisions in the capital sentencing context is also necessary in the state appellate process reviewing death sentences, in view of the powerful forces which can influence discretion.

III. A HAPHAZARDLY APPLIED STATE PROCEDURAL BAR IS NOT AN ADEQUATE AND INDEPENDENT STATE GROUND

The rule that state courts cannot avoid federal review by resting a denial of a federal claim upon the erratic and arbitrary invocation of a state procedural bar is long and firmly settled. Justice Holmes in 1923 described the rule as "general and necessary" because "[i]f the Constitution and laws of the United States are to be enforced," the federal courts are obliged "to see that local practice shall not be allowed to put unreasonable obstacles in the way." *Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923). See also *Love v. Griffith*, 266 U.S. 32, 33-34 (1924); *Staub v. City of Baxley*, 355 U.S. 313, 319-20 (1958); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 455-58 (1958).

The arbitrariness principle was reaffirmed in *Barr v. City of Columbia*, 378 U.S. 146 (1964), which involved a breach-of-peace conviction. The state courts had refused to consider the merits of the federal claims, holding that the exceptions that were taken were insufficiently specific. This Court noted that the state courts had previously considered the merits of claims raised by identical exceptions, and for this reason concluded that a procedural rule that is not "strictly or regularly followed cannot deprive us of the right to review." *Id.* at 149. In *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), the Court held a procedural default rule inadequate, stating that "a rule more properly being discretionary than jurisdictional" does not bar federal review, and noting that the rule had not been "so inconsistently applied" as "to amount to a self-denial of the power to entertain the federal claim." *Id.* at 233-34 (emphasis in original). Again, in *Hathorn v. Lovorn*, 457 U.S. 255 (1982), where a state court refused to review issues raised for the first time on rehearing, this Court noted that the state courts had previously considered the merits

of such issues and concluded that the state court's denial of rehearing "must have rested either upon a substantive rejection of petitioner's federal claim or upon a procedural rule that the state court applies only irregularly." *Id.* at 264-65. Since the state court did not apply the rule "evenhandedly to all similar claims," *id.* at 262, this Court found the rule inadequate.

The Court adhered to the arbitrariness principle in *James v. Kentucky*, 466 U.S. 341 (1984). The issue in *James* was the trial court's failure to instruct the jury that no adverse inference could be drawn from the defendant's failure to testify. The defendant had in fact asked for an "admonition," which the trial court denied. On appeal, the Kentucky Supreme Court conceded that the Constitution required that an instruction be given, but noted that the defendant had asked for an admonition instead of an instruction. The state's highest court held that the defendant "was entitled to the instruction, but did not ask for it. The trial court properly denied the request for an admonition." *James v. Commonwealth*, 647 S.W.2d 794, 795-96 (Ky. 1983).

This Court held that the procedural default rule was inadequate because of its arbitrary application. The Court based its decision on a review of state law that revealed that the state law "distinction between admonitions and instructions is not always clear or closely hewn to." 466 U.S. at 346. The Court held that a state procedural rule applied in an arbitrary manner is not adequate.

The question is whether counsel's passing reference to 'an admonition' is a fatal procedural default under Kentucky law adequate to support the result below and to prevent us from considering petitioner's constitutional claim. In light of the state-law background described above, we hold that it is not. Kentucky's distinction between admonitions and instructions is *not the sort of firmly established and regularly fol-*

lowed state practice that can prevent implementation of federal constitutional rights.

Id. at 348-49 (emphasis added).

The Court reaffirmed the arbitrariness principle most recently in *Johnson v. Mississippi*, 108 S. Ct. —, No. 87-6488 (U.S. June 13, 1988). The Mississippi Supreme Court in *Johnson* procedurally barred a post-conviction claim for failure to raise the issue on direct appeal. This Court, quoting *Hathorn* and *Barr*, reiterated that a "state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.'" *Johnson*, slip op. at 8. The Court found "no evidence" that the procedural bar relied upon by the Mississippi Supreme Court had been "consistently or regularly applied." *Id.*

The discretion standard and the arbitrariness standard are consistent with and supported by the universally recognized principles underlying the adequate and independent state ground doctrine. Both rules help to ensure against state court evasion of the enforcement of federal rights. The Court has long held that a state procedural default rule used to evade the enforcement of federal rights is inadequate and, by extension, that certain uses of state procedural default rules—though not evidencing an intent to evade—must be found inadequate to guard against undetectable evasion.

The Court has repeatedly noted the significance of the evasion principle. *E.g.*, *Nickel v. Cole*, 256 U.S. 222, 225 (1921); *Vandalia R.R. v. Indiana ex rel. South Bend*, 207 U.S. 359, 367 (1907); *Leathe v. Thomas*, 207 U.S. 93 (1907). The principle does not and cannot mean, however, that federal courts must inquire into whether state courts are applying their procedural rules with an actual intent to evade the enforcement of federal rights. Such an inquiry would undercut any semblance of federalism. "Few doctrines would be more destructive of harmonious relationships between federal and state ju-

diciaries than one which requires the Supreme Court to inquire into the good faith of state judges." *Sandalow, Henry v. Mississippi and the Adequate State Ground*, 1965. Sup. Ct. Rev. 187, 220 n.141. Further, the analytical tools available to the federal courts make such inquiry practically impossible as well as unseemly. *Id.* at 220.

Accordingly, the Court has adopted tests that provide objective standards for the protection of federal rights. The discretion principle and the arbitrariness principle are two such tests. Hill *The Inadequate State Ground*, 65 Colum. L. Rev. 943, 988 n.182 (1965).

IV. FLORIDA'S RULE AGAINST COLLATERAL CONSIDERATION OF CAPITAL SENTENCING ERRORS NOT RAISED ON DIRECT APPEAL IS A DISCRETIONARY RULE, AND THE RULE IS APPLIED IN A HAPHAZARD AND ARBITRARY MANNER THAT DEPRIVES IT OF ENFORCEABILITY FOR PURPOSES OF *WAINWRIGHT v. SYKES*

The Florida Supreme Court exercises broad discretion to enforce or forgive procedural defaults in capital cases. That discretion is not limited in Florida by principles of law. Although the Florida Supreme Court sometimes declines to reach the merits of capital sentencing issues raised in collateral proceedings on the ground that issues should have been raised on direct appeal, that same court at other times reaches the merits of identical issues in identical circumstances of default.

A. Florida's Default Rules are Discretionary

The Florida Supreme Court has broad—apparently unlimited—discretion to enforce or excuse procedural defaults in capital cases. The former Fifth Circuit half a decade ago observed that "established [Florida] law" provides that "in death cases, the Florida Supreme Court exercises a special scope of review enabling it to excuse procedural defaults." *Henry v. Wainwright*, 686 F.2d

311, 314 (5th Cir. 1982) (Unit B), *vacated for reconsideration on other grounds*, 463 U.S. 1223 (1983).

Florida Rule of Appellate Procedure 9.140(b) provides that the Florida Supreme Court's "Scope of Review" is as follows:

The court shall review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal. In the interest of justice, the Court may grant any relief to which any party is entitled. In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review.

The Florida Supreme Court has used its discretion to forgive trial level defaults. In *Elledge v. State*, 346 So. 2d 998 (Fla. 1977), for example, the court noted that although certain testimony "was not objected to by appellant's trial counsel," that "should not be conclusive of the special scope of review by this Court in death cases." *Id.* at 1002.

The Florida Supreme Court also possesses discretion to forgive defaults on direct appeal. In *Davis v. State*, 461 So.2d 67 (Fla. 1984), the Florida Supreme Court reaffirmed the wide scope of its review in capital cases and made clear that under state law the court possesses the discretion to consider capital sentencing issues on direct appeal, even if the appellant's lawyer explicitly waives such consideration. The court's opinion explained that Davis' appellate attorney did not challenge the death sentence. In response to questioning at oral argument in the Florida Supreme Court, defense counsel stated that he made a tactical choice not to raise sentencing issues and gave several strategic reasons for his considered decision to deliberately waive any sentencing issues. The Florida Supreme Court held, however, that Florida's capital statute "directs [the Florida Supreme] Court to review both the conviction and sentence in a death

case, and we will do so here on our own motion." *Id.* at 71. The court then went on to hold that one aggravating circumstance had been improperly found by the sentencing judge. When the case returned to the Florida Supreme Court on collateral review, the court affirmed the denial of post-conviction relief and observed that it had previously reviewed the imposition of the death sentence "on our own as statute [sic] requires that we do." *Davis v. Wainwright*, 498 So.2d 857, 858 (Fla. 1986).

In *Jacobs v. State*, 396 So.2d 713, 717 (Fla. 1981), the Florida Supreme Court was "not favored with any help from either counsel on the issue of the imposition of the death penalty," but still "we must review the propriety of the death sentence." Upon doing so, the court vacated the death sentence in *Jacobs*. Cf. *Martin v. State*, 420 So.2d 583, 585 (Fla. 1982) (noting scope of review in capital cases); *Armstrong v. State*, 429 So.2d 287, 289 (Fla. 1983) (same).

Perhaps the most extraordinary example of the Florida Supreme Court's power and willingness to reach out to decide defaulted capital sentencing claims is *Rose v. State*, 425 So.2d 521 (Fla. 1982), where the court first established that a six-to-six jury sentencing recommendation should be treated as a life recommendation rather than as a hung jury. There, the sentencing jury, after deliberating for some time, advised the court that they were tied six-to-six and that no jurors would change their minds; the jury requested further instructions. The judge responded by giving a jury deadlock charge, and the jury responded shortly thereafter by returning a seven-to-five recommendation of death. The Florida Supreme Court reversed the death sentence and remanded for resentencing, holding that the proper action for the trial judge to have taken when confronted with the jury's request for further instructions would have been to instruct the jury that it was not necessary to have a majority reach a sentencing recommendation of life im-

prisonment, because “if seven jurors do not vote to recommend death, then the recommendation is life imprisonment.” *Id.* at 525. Yet this was an issue raised neither at trial, nor in the appellate briefs or at oral argument before the Florida Supreme Court, where all parties agreed that a six-to-six vote was a hung jury.

Thus, the Florida Supreme Court possesses under state law the discretion to enforce procedural defaults or to forgive them. That court’s “discretionary decision to deny” consideration of a federal claim, *Williams*, 349 U.S. at 389, is an “act so arbitrary and so cruel, considering that life is at stake,” *Daniels v. Allen*, 344 U.S. at 557 (Frankfurter, J., dissenting), that it is entitled to no deference under *Sykes*.

B. Florida’s “Raised or Could Have Been Raised on Direct Appeal” Rule is Haphazardly Applied

The Florida Supreme Court’s broad direct review discretion to decide defaulted claims of condemned inmates extends to issues brought for the first time in state post-conviction proceedings. While the Florida Supreme Court sometimes declines to reach the merits of claims raised for the first time in post-conviction proceedings, that court at other times decides the merits of identical issues in identical situations. Its cases demonstrate the haphazard application of Florida’s “raised or could have been raised on direct appeal” rule in capital cases.

In *Stone v. State*, 481 So.2d 478 (Fla. 1985) and *Booker v. State*, 441 So.2d 148 (Fla. 1983), the Florida Supreme Court barred post-conviction claims that Florida applies its death penalty system in a racially discriminatory manner—the substantive issue subsequently addressed by this Court in *McCleskey v. Kemp*, 107 S. Ct. 1756 (1987).⁴ In *Stone*, the Florida Supreme Court held

⁴ In *Stone* and *Booker*, as well as in other cases discussed below, it is not apparent from the face of the Florida Supreme Court’s

that the discrimination issue either “[was] or could have been raised on direct appeal” and therefore was not a “proper matter[] to be considered” in a post-conviction proceeding. 481 So.2d at 479. In *Booker*, the court also deemed the petitioner to be procedurally barred from raising this discrimination issue for the first time in a post-conviction proceeding because this claim “could have been raised on direct appeal.” 441 So.2d at 150. Yet as early as 1979—four years before it decided *Booker* and six years before it decided *Stone*—the Florida Supreme Court had held that the identical discrimination claim “can properly be raised . . . in a proceeding for post-conviction relief.” *Henry v. State*, 377 So.2d 692, 695 (Fla. 1979). Consistent with *Henry*—and inconsistent with *Booker* and *Stone*—are *Meeks v. State*, 382 So.2d 673 (Fla. 1980) and *Smith v. State*, 457 So.2d 1380 (Fla. 1984). The court in *Meeks* and *Smith* held that claims of systemic racial discrimination are cognizable in post-conviction proceedings. *Smith*, 457 So.2d at 1381; *Meeks*, 382 So.2d at 675. Most recently, in *Stewart v. State*, 495 So.2d 164 (Fla. 1986), the court said, without reference to *Stone* or *Booker*, that “since *Henry v. State* we have held that the [discrimination] claim is cognizable” in a post-conviction proceeding; as of 1984, the issue “had been found to be cognizable for at least six years.” 495 So.2d at 165 (citation omitted). Thus, in 1979 and 1980 the Florida Supreme Court held that the discrimination claim *could* be brought in a post-conviction proceeding (*Henry* and *Meeks*); in 1983 the

opinions that racial discrimination was the underlying merits issue. The court’s opinion in *Stone* framed the underlying merits issue in terms of “unconstitutionality of the Florida death penalty as applied,” while the court’s opinion in *Booker* characterized the issue as a challenge to the “arbitrariness of Florida’s death penalty.” *Stone*, 481 So.2d at 479; *Booker*, 441 So.2d at 151. But the pleadings filed in these two cases, as well as in other cases discussed below, make clear that systemic discrimination was in fact the substantive issue presented in these cases. Such pleadings are available from the Florida Supreme Court or from undersigned counsel.

court held that the claim could *not* be brought in a post-conviction proceeding (*Booker*); in 1984 the court held that it *could* be (*Smith*); in 1985 the court held that it could *not* be (*Stone*); and in 1986 the court held that it *could* be (*Stewart*).

Similarly, in *Ford v. State*, 407 So.2d 907, 908 (Fla. 1981), *Thomas v. State*, 421 So.2d 160, 162 (Fla. 1982), and *Funchess v. State*, 449 So.2d 1283, 1284 (Fla. 1984), the Florida Supreme Court held that challenges to penalty phase jury instructions could not be raised in state post-conviction proceedings because the claims should have been raised on direct appeal. Neither Ford, Thomas nor Funchess objected to the instructions at trial; they did not attack the instructions on direct appeal; they challenged the instructions for the first time in state post-conviction proceedings, and the Florida Supreme Court in each case found the claims to be in procedural default for that reason. However, in *Riley v. State*, 433 So.2d 976, 978-79 (Fla. 1983), and *Straight v. Wainwright*, 422 So.2d 827, 831 (Fla. 1982), the Florida Supreme Court—without discussion of procedural default—reached the merits of post-conviction challenges to jury instructions. Like Ford, Thomas and Funchess, Riley and Straight did not object to the jury instructions at trial and did not challenge them on direct appeal. But unlike its dispositions in *Ford*, *Thomas* and *Funchess*, the Florida Supreme Court in *Riley* and *Straight* decided the merits of the instructional claims. Thus, in 1981 the Florida Supreme Court held that instructional claims could not be brought in post-conviction proceedings (*Ford*); the next year the court in September held that such claims could be raised in post-conviction (*Straight*), but in October held that they could not be (*Thomas*); the following year the court held that the claims could be raised in post-conviction proceedings (*Riley*), but the year after that the court held that they could not be (*Funchess*).

Other examples abound. In *Funchess v. State*, 449 So.2d 1283, 1284 (Fla. 1984), the petitioner was barred

from raising in post-conviction a claim that the death penalty was inappropriate in his case because he had not been convicted of premeditated murder; the court found that the claim should have been raised on direct appeal. However, in *Hall v. State*, 420 So.2d 872, 874 (Fla. 1982), the court addressed the merits of an identical claim without reference to procedural default. As in *Funchess*, the petitioner in *Hall* had not raised the issue at trial or on direct appeal.

In *Goode v. State*, 403 So.2d 931, 932 (Fla. 1981), the court barred a post-conviction claim that the trial court had improperly relied upon an invalid aggravating circumstance. Yet in *Demps v. State*, 416 So.2d 808, 809 (Fla. 1982), the court in post-conviction proceedings reached the merits of the claim of use of invalid aggravating circumstances. The *Demps* court did not discuss the procedural bar as to this issue, despite an earlier discussion of the bar as to other claims in the case. *Id.* at 809. Again, in *Ruffin v. State*, 420 So.2d 591, 592 (Fla. 1982), the court decided the merits of a post-conviction claim that an aggravating circumstance was improperly found without discussion of procedural default. Thus, the claim was deemed barred in 1981 in *Goode*, and cognizable one year later in *Demps* and *Ruffin*.

Finally, in *Messer v. State*, 439 So.2d 875, 879 (Fla. 1983) the court refused to consider a state habeas petitioner's argument that due process entitled him to explicit proportionality review by the Florida Supreme Court. Yet five weeks after its decision in *Messer*, the court in *Booker v. State*, 441 So.2d 148, 153 (Fla. 1983), reached out and decided the merits of this claim in a state habeas case.

These examples demonstrate that Florida has no consistently applied rule barring consideration of issues raised in collateral proceedings that could have been raised on direct appeal, at least in cases raising capital

sentencing issues. A discretionary procedural rule applied in such a haphazard, arbitrary fashion does not satisfy the adequate and independent state ground test. Therefore the State's invocation of this rule in Mr. Adams' case does not trigger a *Wainwright v. Sykes* limitation of federal habeas corpus review.

CONCLUSION

Florida applies its discretionary rule against collateral consideration of capital sentencing errors not raised on direct appeal in a haphazard and arbitrary manner that deprives it of effect under *Wainwright v. Sykes*.

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Date: July 1, 1988

** Counsel gratefully acknowledge the valuable assistance of Judith Dillon and James Moreno, law students at Vermont Law School, in the preparation of this brief.

